Trafficking in Women in Canada: A Critical Analysis of the Legal Framework Governing Immigrant Live-in Caregivers and Mail-Order Brides

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ACRONYMS AND ABBREVIATIONS

C.A.Q.	Certificat d'acceptation du Québec [Quebec acceptance certificate]
CATW	Coalition Against Trafficking in Women
C.C.Q.	*Civil Code of Québec*
CNT	Commission des normes du travail [labour standards board, Quebec]
C.P.A.	*Consumer Protection Act*
CSST	Commission de la santé et de la sécurité au travail [occupational health and safety board, Quebec]
FDM	Foreign Domestic Movement [federal program, 1981-1992]
GAATW	Global Alliance Against Traffic in Women
I.A.O.D.A.	*Act respecting industrial accidents and occupational diseases*
LCP	Live-In Caregiver Program
LRAG	Legislative Review Advisory Group
L.S.A.	*Act respecting labour standards*
MOB	Mail-order bride
O.H.S.A.	*Act respecting occupational health and safety*

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PREFACE

Good public policy depends on good policy research. In recognition of this, Status of Women Canada instituted the Policy Research Fund in 1996. It supports independent policy research on issues linked to the public policy agenda and in need of gender-based analysis. Our objective is to enhance public debate on gender equality issues and to enable individuals, organizations, policy makers and policy analysts to participate more effectively in the development of policy.

The focus of the research may be on long-term, emerging policy issues or short-term, urgent policy issues that require an analysis of their gender implications. Funding is awarded through an open, competitive call for proposals. A non-governmental, external committee plays a key role in identifying policy research priorities, selecting research proposals for funding and evaluating the final reports.

This policy research paper was proposed and developed under an urgent call for proposals in September 1998, entitled *Trafficking in Women: The Canadian Dimension*. The purpose of this call was to generate research, which could provide concrete knowledge on the extent and nature of trafficking in Canada, in order to develop policies and programs which would recognize and protect the human rights of trafficked women.

Status of Women Canada funded four research projects on this issue. They deal with Filipino mail-order brides, sex trade workers from Eastern Europe and the former Soviet Union, the legal framework for mail-order marriages and immigrant domestic workers, and a comprehensive profile of women trafficked to, from, and within Canada. A complete list of research projects funded under this call for proposals is included at the end of this report.

We thank all the researchers for their contribution to the public policy debate.

ABSTRACT

This report contains an analysis, from a feminist and intersectional perspective, of the legal framework governing two forms of trafficking in women in Canada, namely, the hiring of immigrant live-in caregivers under the Live-in Caregiver Program (LCP), and the mail-order bride business. It examines federal and provincial legislation, as well as the caselaw and literature. In analysing the situation of immigrant live-in caregivers, the report takes a critical look at the federal program as well as the labour legislation affecting these workers. The study of the mail-order bride business begins with a description of this phenomenon followed by an examination of its legal framework, including contractual rules, immigration law, and the laws of marriage and marriage breakdown. It also addresses the issues of domestic violence, prostitution and introduction agencies. We propose reforms to immigration law, labour law and social legislation to ensure respect for the fundamental rights of these women. We also recommend measures on the international level to eradicate the exploitation resulting from the two forms of trafficking studied.

SUMMARY

We shall analyse the legal framework governing two forms of trafficking in women: the hiring of immigrant live-in caregivers and the mail-order bride business. We define trafficking in women as the exploitation of a woman, in particular for her labour or services, with or without pay and with or without her consent, by a person or group of persons with whom she is in an unequal power relationship. Trafficking in women, which can take the form of abduction, the use of force, fraud, deception or violence, results in the cross-border movement of people between countries differentiated by economic inequality. Among the consequences of such trafficking are the immigration, both legal and illegal, of women to Canada, and the violation of their fundamental rights. Despite the apparent neutrality of the law governing these situations, we have chosen a feminist theoretical framework, since our research is concerned with the fate of the women who are being trafficked. Moreover, we have adopted an intersectional approach, which takes into account the interrelationship between the ethnic, religious and cultural identities of the women subjected to this type of exploitation.

In the first chapter, we shall analyse the legal framework for hiring immigrant live-in caregivers under the Live-in Caregiver Program (LCP). This phenomenon raises issues of immigration law, social legislation and labour law, human rights, and contract law. The unequal relationship between an immigrant live-in caregiver and her employers, the obligation to live in their home for a period of two years, as well as the precariousness of her work status during this period, lead to situations of abuse. Thus we propose that this program be discontinued because it allows the exploitation of immigrant workers. However, in order to enable such workers to immigrate to Canada to counteract the shortage of live-in caregivers, we suggest that the immigration criteria for the independent class be amended. We propose that the *Immigration Act* include "live-in caregiver" among the occupations in demand in Canada, and give more consideration to the experience of these workers.

Furthermore, if the discontinuation of this program is not accepted, we propose that it be improved by granting these women permanent residence upon their arrival in Canada, by reducing the work period to 12 months, and by removing the obligation to live in the employers' home. We also recommend that the agencies recruiting live-in caregivers be regulated. Finally, we suggest providing increased and regular funding to organizations assisting these women, better information to the women themselves, financial assistance to parents, and a national childcare program.

In the area of labour law, we consider the exclusion of live-in caregivers from certain provisions in statutes dealing with labour and social protection to be unjustified. Consequently, we propose that they be given the same benefits as other Canadian workers.

Finally, contracts required by the various levels of government serve no purpose because of the unequal and precarious position of immigrant live-in caregivers. Hence, we recommend the dissemination of information among these workers regarding their rights, and the establishment of a registry of employers.

The second chapter deals with the mail-order bride (MOB) trade. Using the services of MOB agencies, operating mainly via the Internet, consumer-husbands meet women who will become their fiancées and, eventually, their wives. Such encounters result in marital relations often marked by bonds of subordination, which keep the brides under the yoke of their consumer-husbands and sometimes engender situations of spousal violence. Furthermore, the interplay of the many forms of inequality places the brides in an inferior position within the economic, sexual, ethnic and cultural hierarchical dichotomies.

As no law deals specifically with the mail-order bride industry, we shall analyse the many legal areas governing this phenomenon: contract law, immigration law, the law of marriage and marriage breakdown, private international law, and criminal law. We conclude that contractual remedies yield little benefit for the bride. However, immigration law does offer a married woman significant legal protection. Indeed, a bride who enters Canada on a spousal visa enjoys permanent resident status, as well as the financial security flowing from the sponsorship undertaking given by the consumer-husband. On the other hand, a fiancée remains subject to conditions making her vulnerable to an abusive consumer-husband. Consequently, we propose the removal of the condition of marriage for obtaining a fiancée visa. We also recommend prohibiting serial sponsorship and increasing the minimum age for spouses admitted to Canada.

The existence of a valid marriage, whether it takes place in the bride's country of origin or in Canada, constitutes a necessary condition with regard to the criteria for admission to Canada as an immigrant. Accordingly, we shall analyse the technical aspects of the validity of such marriages. Furthermore, we propose the reinstatement of the former remedy of breach of promise of marriage. Finally, marriage breakdown does not affect the permanent resident status of the bride or the sponsorship undertaking of the consumer-husband, who remains financially responsible for his former wife.

We also emphasize the relationship between the phenomenon of mail-order brides and criminal activity, such as domestic violence and procuring for the purposes of prostitution. We suggest measures aimed at encouraging brides to take legal action against irresponsible, abusive and criminal consumer-husbands. Last, we recommend that MOB agencies be regulated.

GENERAL INTRODUCTION: RESEARCH PARAMETERS

The intensification of international trade and foreign direct investment was supposed to ameliorate the economic situation in developing countries. While it is perhaps still too soon to assess the impact of these developments, current circumstances in these countries tend to indicate the opposite.[1] One of the consequences of the globalization of markets has been an increase in the migration of workers from those countries, especially female workers. Indeed, large numbers of women are leaving their home countries because they are unable to earn a living. The hope for a better future for themselves and their families impels them to go abroad for work, marry strangers and even immigrate illegally, resulting in the trafficking of women and young girls. Such "merchandizing" of women, which is attracting more and more media attention,[2] takes a variety of forms, such as mail-order brides, arranged marriages, sham adoptions, forced labour situations, slavery-like practices and prostitution. In Canada, trafficking in people represents a market of $120 million to $400 million, affecting 8,000 to 16,000 illegal immigrants annually.[3] This transnational movement of people is happening at a time when rich countries are closing their doors to poor and uneducated immigrants. Canada, a country built primarily by immigrants, is also tightening its border controls.[4]

In this context, the problem of trafficking in women in Canada becomes more acute. Is Canada, which presents itself on the international scene as a country that respects human rights, intentionally or unintentionally contributing to the trafficking in women? Our aim is

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1 See Lin Lean LIM, *The Analysis of Factors Generating International Migration: The Processes Generating the Migrating of Women*, Technical Symposium on International Migration and Development, The Hague, Netherlands, June 29–July 3, 1998 (copy obtained from the author); *Flexible Labour Markets in a Globalizing World: The Implications for International Female Migration*, Geneva: International Labour Office, 1997 (copy obtained from the author).

2 See, *inter alia*, Radio-Canada, April 14, 2000, "Le Canada au coeur du trafic international d'esclaves sexuels," http://radio-canada.ca/url.asp?/nouvelles/45/45430.htm (accessed on June 6, 2000).

3 These figures are quoted by Pascale GUÉRICOLAS, "Géographie de l'inacceptable," *Gazette des femmes*, May-June 2000, Vol. 22, No. 1, p. 27, who refers to the "Organized Crime Impact Study" by the Solicitor General of Canada, cited in *The Factbook on Global Sexual Exploitation*, Coalition Against Trafficking in Women, http://www.uni.edu/artsci/hughes/catw/catw.htm (accessed on September 8, 2000).

4 Here we have in mind the bill tabled by the Government of Canada with respect to immigration and refugees. See Bill C-31, *An Act respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd session, 36th Parliament, 48-49 Elizabeth II, 1999-2000, http://www.parl.gc.ca/36/2/parlbus/chambus/house/bills/government/C-31/C-31_1/C-31_cover-E.html or http://www.cic.gc.ca/french/about/policy/ legrev_f.html (accessed on June 6, 2000). See Vincent MARISSAL, "20,000 'sans-papiers' au Canada, Grande réforme en vue pour faire le ménage et rassurer les Canadiens," *La Presse*, April 7, 2000, p. A-6.

to analyse, from a legal and feminist perspective, the roles of the federal and provincial governments in perpetuating two forms of trafficking in women, namely, the hiring of immigrant live-in caregivers and the mail-order bride industry.[5]

Although trafficking in women may take a number of forms, these two phenomena merit our attention for several reasons. First of all, although they are not new in Canada, the stakes have changed. The *filles du Roy,* brought to New France in the 17th century, were an early version of mail-order brides. Moreover, the enslavement of black and Aboriginal women in Canada during the 18th century was a precursor to the hiring of immigrant live-in caregivers.[6] Thus the phenomena of immigrant live-in caregivers and mail-order brides have antecedents in Canada. In recent years, however, the advent of the Internet in the context of globalization, among other factors, has engendered a disquieting proliferation of such trafficking, due to increased access to catalogues, and has generated new problems.[7] To those factors can be added rising poverty in the countries of origin of the women who wish to go abroad by entering into caregiver contracts or mail-order marriages. A study of this type of commerce is further justified by the precariousness of the status of these immigrant women once in Canada. Indeed, the growing poverty of women in general is likely to have an even greater impact on them. Finally, these two situations have several aspects in common. They occur in the private sphere, out of sight, a fact that in itself is often a source of abuse. They function in areas traditionally reserved for women, where they must care for others. In both cases, despite existing legislation, the women are poorly protected and vulnerable. For these reasons, research into the two phenomena, from a specifically legal and feminist perspective, is imperative.

Within this framework, we shall analyse federal and provincial legislation, as well as caselaw and literature, directly and indirectly relevant to these two situations likely to lead to trafficking in women. Where necessary, we shall propose measures to remedy the situation. In the first chapter of our report, we shall examine the legal status of women who arrive in Canada under the Live-in Caregiver Program. The second chapter deals with the mail-order bride business. First, however, it is essential to define the concept of "trafficking in women"(1) and the theoretical framework of our research (2).

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5 Our study is part of a much larger research program funded by Status of Women Canada on trafficking in women. Other research is addressing different forms of trafficking in women in Canada, such as prostitution.

6 See Makeda SILVERA, *Silenced*, Toronto: Sister Vision, 1989.

7 See Amy L. ELSON, "The Mail-Order Bride Industry and Immigration: Combating Immigration," (1997) 5 *Indiana J. Global Legal Stud.* 367.

1 DEFINITION OF "TRAFFICKING IN WOMEN"

In order to clearly delimit the subject of our study, we shall define the concept of "trafficking in women." Our definition is inspired by that proposed by Marjan Wijers and Lin Lap-Chew:

> Trafficking in Women: all acts involved in the recruitment and/or transportation of a woman, within and across national borders for work or services by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.
>
> Forced Labour and Slavery-like Practices: the extraction of work or services from any woman, or the appropriation of the legal identity and/or physical person of any woman by means of violence or threat of violence, abuse of authority or dominant position, debt bondage, deception or other forms of coercion.[8]

Thus, for our purposes, trafficking in women is the exploitation of a woman, in particular for her labour or services, with or without pay and with or without her consent, by a person or group of people with whom she is in an unequal power relationship. Trafficking in women, which can take the form of abduction, the use of force, fraud, deception or violence, results in cross-border movements of people between countries differentiated by economic inequality. Among the consequences of such trafficking are the legal or illegal immigration of women to Canada, and the violation of their fundamental rights. This definition calls for some comment.

First, it is important to define the concept of "trafficking in women" broadly because the strategies, policies and solutions adopted to combat this phenomenon depend on it. In the beginning of the 20th century, "trafficking in women" was understood to mean exclusively

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[8] *Trafficking in Women: Forced Labour and Slavery-Like Practices in Marriages, Domestic Labour and Prostitution*, Utrecht, Netherlands: Foundation Against Trafficking in Women, 1997, p. 36. The authors explain that the definition must contain two elements, namely, trafficking and forced labour, because there are situations where recruitment is conducted legally, but working conditions become abusive. For example, an arranged marriage may appear at first glance to be a form of trafficking. However, this is not necessarily the case if it is neither abusive nor violent thereafter. On the other hand, a mail-order bride transaction may seem to have been conducted in good faith, but can lead to prostitution rings, sexual abuse or even domestic violence.

See also the definition of the Global Alliance Against Traffic in Women (GAATW): "All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion, or debt bondage." See GLOBAL ALLIANCE AGAINST TRAFFIC IN WOMEN (GAATW), Foundation Against Trafficking in Women, and International Human Rights Group, *Human Rights Standards for the Treatment of Trafficked Persons*, January 1999, p. 1.

prostitution without a woman's consent, as in cases of abduction. Today, the definition has been broadened to encompass the complex problems associated with trafficking and the diverse situations of women. It now includes mail-order brides, arranged marriages, sham adoptions, forced labour and slavery-like practices.[9] The latter two situations must be included in a contemporary definition of trafficking in women because they involve areas traditionally reserved for women, such as domestic work, which is often the only work women can do, especially in difficult economic times.[10] A broad definition, extending beyond prostitution, must also take into account the unequal relationship between wealthy nations (which are the destination of the trafficking) and poor nations (which are its source). Indeed, trafficking in women flows from the imbalance between rich and poor nations. The definition must in addition take into consideration the women's point of view and the component of violence in both their recruitment and their living and working conditions.

Furthermore, a broad definition of trafficking must take into account feminist considerations insofar as our ultimate objective is to respond to the needs of these women. In fact, many diverse interests come into play in defining a concept. In the case of trafficking in women, there are the interests of the exporting nation, which views the emigration of its nationals as a solution to unemployment and needs the foreign currency they send home to their families.[11] On the other hand, the importing nation wants to control immigration, prostitution and organized crime, as well as the agencies and intermediaries involved. Therefore, a definition of trafficking in women may be more or less comprehensive, depending on the interests being considered. For example, a definition of trafficking centred on the legal or illegal nature of the immigration, which may satisfy the needs of the destination country, will divert attention from the violence of which women are victims, and which turns them into criminals.[12] The interests of the women, which do not coincide with those of the state, are thus easily forgotten. It is therefore of paramount importance to formulate a definition of trafficking based on the needs of these women, in order to give them visibility and to propose realistic reforms which take them into account.

Our definition takes intersectional considerations into account.[13] In fact, although it affects mainly women,[14] trafficking is not limited exclusively to a problem of gender relationship. It

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9 See Janie CHUANG, "Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts," (1998) 11 *Harvard Human Rights Journal* 65; M. WIJERS and L. LAP-CHEW, *idem*, p. 29 ff.

10 See M. WIJERS and L. LAP-CHEW, *supra*, note 8, p. 29 ff. There is also said to be an increased demand for domestics. See L.L. LIM, *Flexible Labour Markets in a Globalizing World: The Implications for International Female Migration*, *supra*, note 1, p. 12.

11 On the policies of countries supplying workers, see L.L. LIM, *The Analysis of Factors Generating International Migration: The Process Generating the Migration of Women*, *supra*, note 1, p. 10.

12 See M. WIJERS and L. LAP-CHEW, *supra*, note 8, p. 32.

13 On the intersectional aspect of immigrant live-in caregivers, see Tanya SCHECTER, *Race, Class, Women and the State: The Case of Domestic Labour*, Montréal: Black Rose Books, 1998.

also raises ethnic problems because these women come from Third World countries. Moreover, trafficking entails issues of social inequality[15] because it occurs between social classes. The concept of intersectionality is essential to our study because it leads to a multi-dimensional analysis and understanding of belonging simultaneously to more than one identity group, without subordinating one to another. An intersectional analysis of these multiple identities, distinct yet interrelated at the same time, requires a contextual examination of the intersections between memberships in gender, ethnic and social groups. The cultural, political and socio-economic contexts in which these identity groups exist shed light on the various meanings and consequences of the intersection of group memberships and the various manifestations flowing therefrom. Our objective is to avoid considering the gender relationship in isolation, which would pose the risk of hiding other types of inequality suffered by women in the context of international trafficking.[16]

As our definition of trafficking is inspired by a feminist and intersectional approach, so too are our solutions. In formulating solutions to the problems generated by trafficking in women, the effects on their lives must be taken into account. One must be wary of the policies of certain Western countries, which criminalize trafficking in women in order to close their borders and prevent immigration. Our concern remains centred on the women. For example, proposing measures to prevent illegal entry or illegal residence may be harmful to women because they will continue to endure difficult conditions to avoid finding themselves in an illegal situation.[17] Women who entered a country illegally will be forced to turn to prostitution, and will not report the pimps who exploit them for fear of being deported. Hence, this type of measure only serves to exacerbate the exploitation of such women. Whether individual or collective,[18] the solutions advocated here take into account, first and foremost, the interests of the women concerned, and seek to empower them. They also go beyond proposals of a legislative or judicial nature, and invoke other strategies, such as raising the awareness of these women and providing them with various forms of financial assistance.

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14 Trafficking first and foremost affects women and girls forced to work as prostitutes, to consent to arranged marriages or to work as domestics. Of course, trafficking may also force men and boys to work in agriculture or in underground factories.

15 See Myriam BALS, *Les domestiques étrangers au Canada, esclaves de l'espoir*, Paris/Montréal: L'Harmattan, 1999, p. 185; Patricia M. DAENZER, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s*, Toronto: Canadian Scholars' Press Inc., 1993, p. 137.

16 See Marie-Claire BELLEAU, "Intersectionalité: Feminisms in a Divided World (Quebec, Canada)," in Dorothy E. CHUNN and Dany LACOMBE, eds., *Law as a Gendering Practice*, Don Mills, Ontario: Oxford University Press, 2000, p.19.

17 See M. WIJERS and L. LAP-CHEW, *supra*, note 8, p. 36.

18 See Sedef ARAT-KOÇ, "Importing Housewives, Non-citizen Domestic Workers and the Crisis of the Domestic Sphere in Canada," in Meg LUXTON, Harriet ROSENBERG, Sedef ARAT-KOÇ, eds., *Through the Kitchen Window: The Politics of Home and Family*, 2nd ed., Toronto: Garamond Press, 1990, p. 80.

As we mentioned above, we have adopted a definition of trafficking in women that focusses on the exploitation of a woman, in particular for her labour or services, with or without pay and with or without her consent. Violence is also an important element. We want to be precise about the meaning we assign to the concepts of exploitation, consent and violence.

By "trafficking in women" we mean a situation of exploitation relating, in particular, to a woman's paid or unpaid labour or services. Exploitation is engendered by the imbalance between the benefits to each of the parties occasioned by a relationship of inequality, which takes a variety of forms: gender inequality, ethnic inequality, economic inequality, age inequality, and so on. Because there is a fundamental inequality between the parties, one of them is enriched at the expense of the other. Exploitation is manifested by threats, violence, the abuse of vulnerability and dependence, and other violations of the victim's fundamental rights. Exploitation can arise in the case of mail-order brides and immigrant live-in caregivers.

Furthermore, according to our formulation, exploitation may occur with or without a woman's consent. The inclusion of situations where women have given their consent in the definition of trafficking invites debate about free choice.[19] Our position may be criticized for denying women who make this choice the capacity to take control of their lives and act in their own name. In fact, for once these women are taking charge of their future and becoming a source of income for their families. We are conscious of the fact that our position may also victimize them. However, our approach is based on the idea that these women cannot exercise any real choice, or give free and informed consent, because of their cultural and economic position in their own countries and the situation of their countries in the global context.[20] Moreover, the non-inclusion of consent as an element of trafficking eliminates the problem of determining the time of consent. One can think of cases where a woman had given her consent at the time she migrated, but after changes in her living and working conditions, she ceased to accept the situation.

Violence is another important element in the concept of trafficking.[21] However, it must be defined. It consists of an unequal physical, psychological or economic relationship between the person being trafficked and the person who profits therefrom. Violence may be present at any stage from the time of recruitment. For example, recruitment may be done in a legal manner but once a woman enters the destination country, her living and working conditions may become abusive, verging on slavery-like practices.

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19 In Ali MILLER and Alison N. STEWART, "Report from the Roundtable on the Meaning of 'Trafficking in Persons': A Human Rights Perspective," (1998) 11 *Women's Rts L. Rep.* 11, 16, it was decided to exclude situations in which women were presumed to have consented to the trafficking.

20 On the increased migration of women around the world, see L.L. LIM, *The Analysis of Factors Generating International Migration: The Processes Generating the Migration of Women, supra*, note 1.

21 See M. WIJERS and L. LAP-CHEW, *supra*, note 8, p. 7.

Unlike other definitions of trafficking in women, our definition excludes certain elements which might be relevant in other contexts. Accordingly, we leave out trafficking within a country and the trafficking of boys.

Trafficking in women is not limited to cross-border movement because it may occur within the borders of one country,[22] for example, from a rural area to a city. However, we are not concerned with this kind of trafficking for the purposes of our research. First of all, from our perspective, the unequal relationship between more and less fortunate countries is a driving force behind trafficking,[23] and that relationship is not present in the case of trafficking within Canada because of the favourable economic conditions here. Second, Canadians who might fall victim to this type of situation in principle enjoy the protection of family, police and the law, unlike immigrant women. Furthermore, Canadians are aware, or should be aware, not only of the social and cultural values that prevail in Canada, but also of those institutions providing recourse. Therefore, we have limited our research to the mail-order bride trade and the hiring of immigrant live-in caregivers, both of which involve the cross-border movement of the women involved.

We have also excluded the trafficking of boys from our research. In fact, young girls do not experience the same kind of trafficking as young boys. Although boys, like girls, may be victims of sexual exploitation, they are primarily subjected to forced labour in clandestine factories and agricultural industries. Because the experience of young girls is closely akin to that of women, they are included in our study.

In light of these clarifications, we repeat the definition of the concept of "trafficking in women" that we formulated for the purposes of our research:

> Trafficking in women means the exploitation of a woman, in particular for her labour or services, with or without pay and with or without her consent, by a person or group of persons with whom she is in an unequal power relationship. Trafficking in women, which can take the form of abduction, the use of force, fraud, deception or violence, results in the movement of people between countries differentiated by economic inequality. The consequences of this trafficking include the legal or illegal immigration of women to Canada and the violation of their fundamental rights.

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22 A. MILLER and A.N. STEWART reject the idea that trafficking exists only in cross-border movement situations. However, they require some form of movement and displacement in order to conclude that trafficking has occurred, even within the borders of one country. See *supra*, note 19, p. 14. See also M. WIJERS and L. LAP-CHEW, *supra*, note 8, p. 7, who do not limit their definition of trafficking to situations involving cross-border movement.

23 Patricia M. DAENZER characterizes the relationship between countries that export workers and countries receiving them as neocolonialism. See "An Affair Between Nations: International Relations and the Movement of Household Service Workers," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 81.

2 THEORETICAL FRAMEWORK

Our remarks are structured on a feminist theoretical framework, i.e., we ask the "woman question": what are the direct and indirect effects on women of the various elements of the legal framework (legislation, caselaw and contracts) relating to mail-order brides and the hiring of immigrant live-in caregivers, taking into account their social circumstances? Such an approach focusses on substantive equality for women because it analyses the effect of the legal framework, which may appear neutral at first glance, on the reality of women's lives. We also address the concept of the citizenship of women in a broad sense: in addition to immigration law, we wish to analyse the effects of trafficking in women on their fundamental rights. Our theoretical framework is also intersectional insofar as it takes into consideration the interrelationship of the ethnic, religious and cultural characteristics of the women being trafficked.[24]

Also, a legal analysis of the mail-order bride trade and the hiring of immigrant live-in caregivers raises the issue of the three fundamental dichotomies in Canadian law: federal and provincial law, civil and common law, and private and public law. An exhaustive study of the two problems we examine must address all three aspects.

First, our study will analyse both federal and provincial law. For example, laws relating to immigration and divorce are under federal jurisdiction. On the other hand, contracts, labour, marriage and certain aspects of immigration law are within provincial legislative competence. The issue of trafficking in women thus poses a difficult problem in terms of the division of powers.

In addition to the division of powers, there is the interaction between Canada's two legal systems. Federal law and the laws of the provinces, except for Quebec, are derived from common law or statutes. Part of Quebec law, in principle the law governing relations between individuals, has its origins in civil law, and is found primarily in the *Civil Code of Québec* (C.C.Q.). A legal analysis of trafficking in women must therefore include both common and civil law.

Furthermore, a legal study of the proposed subject, claiming to be feminist and seeking to achieve substantive equality for women, must transcend the dichotomy between the private and public spheres. The issue of trafficking in women is a striking example of the inherent limitations of this dichotomy for women, because it affects both spheres of jurisdiction equally and therefore the two legal systems as well. Thus the traditional approach, which consists of confining women to the private part of the dichotomy, camouflages the multiple and complex realities of trafficking in women in areas of public law. For example, the mail-order bride business goes beyond the territory traditionally attributed to women, such as family law (private sphere) because it has significant repercussions on immigration law and criminal law (public sphere). Also, a study of these phenomena according to the traditional division of the law into private and public obscures the interaction among various legal

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[24] See Christine S.Y. CHUN, "The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes," (1996) 17 *U. Pa. J. Intern. Econ. L.* 1155.

institutions which directly or indirectly regulate trafficking in women. By way of illustration, with regard to the hiring of immigrant live-in caregivers, it is important to analyse the interplay between immigration law (public sphere), labour law (both public and private spheres) and contract law (private sphere). An isolated analysis of each of these areas of law would provide only a partial picture of the reality of the women subjected to the two types of trafficking examined in this study. For this reason, although the dichotomy will have different consequences depending on the women and the context, generally speaking, feminist researchers have denounced this division of the world into two spheres, a division which has oppressed women.[25] Hence, a feminist and egalitarian legal study must look at the harmful effects on women of this dichotomy, and go beyond it to a genuine analysis of the interplay between the private and public spheres, and between federal and provincial law.

As trafficking in women is a problem on an international scale, various solutions adopted in other jurisdictions must be analysed in order to ensure the realistic application of the reforms proposed. Occasionally, when data are available, we have undertaken a comparative analysis of the regulation of trafficking in women in civil law jurisdictions, such as France, and common law jurisdictions, such as the United States and the United Kingdom. A comparative approach is necessary and appropriate for our study because of the very nature of Canada itself, which has a federal and bi-juridical system of common law and civil law.

Finally, as our text is about women and we have adopted a feminist approach, we have chosen to use feminine pronouns for the subjects of our study. When we speak of workers, live-in caregivers, immigrants and mail-order brides we are referring to women.

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25 See Susan BOYD, ed., *Challenging the Public/Private Divide: Feminism, Law and Public Policy*, Toronto: University of Toronto Press, 1997; Marie-Claire BELLEAU, "La dichotomie droit privé/droit public dans le contexte québécois et canadien et l'intersectionnalité identitaire," (1998) 39 *Cahiers de Droit* 177.

CHAPTER I: THE HIRING OF IMMIGRANT LIVE-IN CAREGIVERS

According to our definition of trafficking in women, immigrant live-in caregivers admitted into Canada under the Live-in Caregiver Program (LCP) may experience a situation of exploitation with the risk of violation of their fundamental rights. We examine this question by analysing the LCP (Part I), legislation concerning the work of immigrant live-in caregivers (Part II), and contractual practices (Part III). We shall make recommendations for rectifying the situation. First, we shall define the framework of our research.

INTRODUCTION

In this introductory section, we shall define the subject of our study, namely, the immigrant live-in caregiver (1). We shall then explain our methodology (2). Taking the Canadian constitutional context into account, we shall address the issue of the impact of the division of legislative powers between the federal government and the provinces on the treatment of the immigrant live-in caregiver (3). Finally, one cannot analyse the legal status of this immigrant worker without discussing the invisibility of her work (4).

1 The Subject: The Immigrant Live-in Caregiver

This part of our research deals with the immigrant live-in caregiver. By this term we mean a worker who arrives in Canada under the LCP. She lives and works full-time in the home of her employers, who are private individuals. Her duties are many and varied. In particular, she attends to the housework, preparation of meals, laundry, sewing, childcare, and care of the elderly or disabled, in exchange for a salary.[1] In some cases, she is also responsible for the care of pets and gardening.[2] In theory, this woman has entered into a contract of employment with her employers. By law she is obligated to live in their home. Generally speaking, there is an unequal relationship between the two parties.[3] The worker enables her employers to be free of household chores and pursue more lucrative and prestigious careers.

Because our study specifically analyses the legal treatment of women who take advantage of the LCP, we have excluded other women who do not come under that program but who work as caregivers and may experience situations of exploitation. Thus we have not included women who meet immigration requirements, for example, women who are sponsored, immigrate to Canada and subsequently obtain paid domestic work. We have excluded women who arrive in Canada as tourists or students and remain after the expiry of their visas. Because of their illegal status, such women often work "underground" as caregivers. Women, as well as children, related to their employers who perform this type of work without remuneration were also not included. Similarly, the experience of women who take part in au pair exchange programs, which may be a source of trafficking, were excluded because Canada does not offer such

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1 For definitions of "caregiver," see Shellee COLEN and Roger SANJEK, "Introduction, At Work in Homes I: Orientations," in Roger SANJEK and Shellee COLEN, eds., *At Work in Homes: Household Workers in World Perspective*, Washington, D.C.: American Ethnological Society Monograph Series, No. 3, 1990, p. 2; Sedef ARAT-KOÇ, "Importing Housewives, Non-citizen Domestic Workers and the Crisis of the Domestic Sphere in Canada," in Meg LUXTON, Harriet ROSENBERG, Sedef ARAT-KOÇ, eds., *Through the Kitchen Window: The Politics of Home and Family*, 2nd ed., Toronto: Garamond Press, 1990, pp. 80, 84.

2 For a description of these duties, see WEST COAST DOMESTIC WORKERS' ASSOCIATION, *Making New Canadians or Making Martyrs? Foreign-Born Domestic Workers' Views and Recommendations about Immigration Policy and Legislation,* Vancouver, June 1999, p. 12.

3 See S. COLEN and R. SANJEK, *supra*, note 1, p. 5.

programs.[4] We left out situations that do not involve relations between poor and rich countries and the cross-border movement of people, such as the case of Canadian citizens who work full-time as caregivers for a single employer, or housecleaners who work in Canada for more than one employer.

Two terms must be more precisely explained. First, we chose the word "caregiver" [French *aide familiale*] because it is less demeaning than "domestic."[5] Others in this field also use it. Thus, the Association des aides familiales du Québec, in its recommendations to the Government of Quebec, proposes the use of this term.[6] It is used in the *Contrat de travail d'une aide familiale résidante* [live-in caregiver work contract],[7] which live-in caregivers are obliged to enter into with their Quebec employers. The LCP also uses this term. Although the term is meant to be neutral, almost all caregivers are women.[8] In French we therefore use the

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4 Instead, Canada offers International Youth and Young Worker Exchange Programs, which consist of exchanges with other countries to allow young Canadians to work and study abroad and host young people from other countries in Canada. See http://www.cic.gc.ca (accessed on May 8, 2000). For the situation in France, see "Le travail au pair," in "Employés de Maison," *Liaisons sociales,* special issue, March 1998, p. 74 ff. For the United States, see Kathleen DELANEY, "A Response to Nannygate: Untangling US Immigration Law to Enable American Parents to Hire Foreign Child Care Providers," (1994) 70 *Indiana Law Journal* 305.

5 See S. COLEN and R. SANJEK, *supra*, note 1, p. 1.

6 See ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE DE MONTRÉAL (now the Association des aides familiales du Québec), *Mémoire présenté à Madame Louise Harel, Ministre de l'Emploi,* January 1995, Recommendation No. 1. In its report, the Comité interministériel d'étude des conditions de travail des aides familiales rejected the proposal by the Association des aides familiales du Québec to adopt the expression *aide familiale* [caregiver] instead of *domestique* [domestic] in various statutes, including the *Act respecting labour standards*. It justified its choice by referring to the interpretation of the *Act respecting labour standards*: [TRANSLATION] "Eliminating the expression 'domestic' from the Act would lead to confusion in the definition of the three categories of *aides familiales*: domestics, childcare workers and persons who care for the elderly, disabled or sick — and would presuppose that the Act [*Act respecting labour standards*] covered the second and third categories." See COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *Rapport du Comité interministériel d'étude des conditions de travail des aides familiales,* Ministère du Travail, Government of Quebec, 1996, p. 29.

7 The standard contract is required by subsection 50(1)(f)(iv), *Regulation respecting the selection of foreign nationals,* R.R.Q., 1981, c. M-23.1, r. 2.

8 According to the WEST COAST DOMESTIC WORKERS' ASSOCIATION, men make up 4 percent of those taking part in the federal program. See *supra*, note 2, p. 1. On the other hand, statistics from the Department of Citizenship and Immigration Canada indicate that slightly more men participate in this program. Of the people who completed the program requirements and obtained permanent residence, 13 percent were men in 1995, 19.58 percent in 1996, 15.67 percent in 1997 and 15.5 percent in 1998. See *Facts and Figures: Immigration Overview,* Department of Citizenship and Immigration Canada, 1998, p. 100 ff. Document obtained at http://www.cic.gc.ca (accessed on May 9, 2000).

feminized expression *aide familiale résidante* for live-in caregiver. However, the standard contract in Quebec[9] states that the feminine form, used for convenience, refers to both men and women.

Second, in referring to the employer within the framework of the LCP, we have used the plural "employers." We did not wish to feminize this term because both parents, or those responsible, act as the employers of the caregiver. The use of a feminine pronoun would suggest that women have continued to be solely responsible for household labour and they alone must find a solution to their dual role.

2 Methodology

Our research consists of a documentary analysis of the legal framework governing the phenomenon of immigrant live-in caregivers, including legislation, caselaw and published literature in this area. To gather this material, we used traditional indexing methods, data banks and the Internet. We also collected copies of contracts between caregivers and employers. Despite our efforts, we were unable to obtain a copy of a signed contract between a caregiver and a recruiting agency, or between future employers and a recruiting agency.

In analysing the legal context of immigrant live-in caregivers, we did not conduct an inquiry into the repercussions of the legal provisions, or compliance with these provisions, on the daily lives of these women in Canada. Instead, we based our study on published personal accounts of immigrant live-in caregivers, on reports prepared by Canadian and foreign advocacy groups defending the rights of these workers, and on government reports. Hence, our direct knowledge of the situation of these immigrant workers is limited.[10] However, we believe that the personal accounts and reports reflect the experiences of some of these women in Canada. As was the case with respect to violence against women, it would be tempting to deny their reality, or at least to attempt to minimize their experiences. Certainly these women enjoy a better situation in Canada than in other countries,[11] which does not mean it is acceptable by Canadian standards. However, we do not want to focus on the worst abuses, such as sexual abuse or imprisonment, suffered by some women but not representative of the experience of the majority, as this might eclipse other forms of equally reprehensible everyday violence involving a sizeable number of these women.

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9 See *supra*, note 7.

10 We discussed this with representatives of immigrant live-in caregivers' rights associations, namely, the Association des aides familiales du Québec (Montréal), Intercede (Toronto), the West Coast Domestic Workers' Association (Vancouver) and the Philippine Women Centre of British Columbia (Vancouver). We also met with a staff person at the Maison d'hébergement pour femmes immigrantes in Québec City.

11 See *infra*, note 88, on the treatment of these workers in other countries.

3 Division of Powers

An analysis of the legal situation of immigrant live-in caregivers raises issues involving the division of powers. While these issues may appear theoretical, they nonetheless have direct consequences on the lives of these workers.

First, Canadian immigration law falls under the concurrent jurisdiction of the federal government and the provinces. This means that both levels of government may legislate in this area.[12] Thus, pursuant to the *Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens*,[13] Quebec has the power to select its own immigrants and certain categories of temporary workers, but the federal government is still responsible for admitting them. Consequently, Quebec is the only province that has adopted its own admission criteria for immigrant live-in caregivers, thereby modifying the criteria in the LCP,[14] a situation that can be a source of confusion for the people involved. British Columbia, Manitoba, Saskatchewan, New Brunswick and Newfoundland have signed agreements with regard to the selection of people designated by the provinces, in order to meet the specific needs of their labour markets.[15] People thus designated do not have to satisfy the usual immigration selection criteria, but they must satisfy the health and security requirements.

Second, working conditions fall within provincial legislative competence. Since immigration legislation has a direct effect on working conditions, a lack of co-ordination between the two levels of government could have adverse repercussions on the workers affected. For example, the obligation imposed on immigrant live-in caregivers by the LCP to live in the home of their employers has negative consequences for their working conditions, which are governed by provincial law. The federal government imposes mandatory live-in residence requirements on immigrant caregivers in order to meet the need for workers in that field, but provincial legislation does not distinguish between hours worked and hours of availability (at night, for example), which leads to abuse. Moreover, the federal government strongly suggests that the employers and the live-in immigrant caregiver enter into a contract. However, it cannot intervene in the event of non-compliance since the enforcement of contracts falls within provincial legislative competence.

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12 Section 95, *Constitution Act, 1867 (B.N.A. Act)*, (U.K.), 30 & 31 Vict., c. 3; s. 108, *Immigration Act*, R.S.C. 1985, c. I-2.

13 Official Gazette of Quebec, 1991.II.1250, signed on February 5, 1991 and in force on April 11, 1991, known as the Tremblay-McDougall Accord. For the text of the Accord, see Frank N. MARROCCO and Henry M. GOSLETT, *Législation canadienne en immigration : texte annoté*, Toronto: Carswell, 1994, "Accords" section, p. 17.

14 See the comparative tables on conditions of admissibility in Myriam BALS, *Les domestiques étrangères au Canada, esclaves de l'espoir*, Paris/Montréal: L'Harmattan, 1999, p. 36. See the brochure *Guide à l'intention des aides familiales résidantes* [Guide for Live-in Caregivers], Government of Quebec, Ministère des Relations avec les citoyens et de l'Immigration, March 1999.

15 See http://www.cic.gc.ca/immigrants (accessed on May 26. 2000).

Hence, in a legal study of immigrant live-in caregivers, we cannot look at immigration legislation without also examining legislation affecting working conditions. The division of powers also obliges the worker to deal with two levels of government, with all the confusion that may entail. This is a concrete case where the division of powers may have adverse effects on women.

4 The Invisibility of Domestic Labour

One cannot analyse the legal framework governing the phenomenon of immigrant live-in caregivers without raising the already well-documented issue[16] of the invisibility and lack of recognition of domestic labour, with or without pay, done by women, and the care they provide for children and other dependent persons. The hiring of immigrant live-in caregivers further underscores this invisibility. As the Conseil des communautés culturelles et de l'immigration du Québec[17] observed in 1990, [TRANSLATION] "Domestic work brings into sharper focus the discriminatory treatment of women's work in the overall hierarchy of paid labour; it reinforces the division of roles along gender lines."[18]

Through its policies and practices with regard to immigration, the federal government also contributes to the invisibility and non-recognition of the value of this labour. Thus, until 1992, within the framework of the federal program for foreign domestic workers then in force, it required that caregivers upgrade their professional qualifications in order to obtain landed immigrant status. The intent was to ensure that these workers would be able to earn a living and not be a burden on Canadian society. Since the program was updated in 1992, that requirement has been dropped. However, a completed high school education is required as a prerequisite for the program. That requirement is justified as follows: "This requirement will help to ensure that participants who apply for permanent residence after two years will be able to succeed in the general labour market."[19] It therefore encourages caregivers to abandon this

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16 See, for example, Chris KYNASTON, "The Everyday Exploitation of Women: Housework and the Patriarchal Mode of Production," (1996) 19 *Women's Studies International Forum* 221; Katherine LIPPEL and Claudine BIENVENU, "Les dommage fantômes : l'indemnisation des victims de lésions professionelles pour l'incapacité d'effectuer le travail domestique," (1995) 36 *Cahiers de Droit* 161.

17 Now the Conseil des relations interculturelles.

18 CONSEIL DES COMMUNAUTÉS CULTURELLES ET DE L'IMMIGRATION, Draft bill, *L'avant-project de loi "Loi modifiant la loi sur les normes de travail et d'autres dispositions legislatives* [An Act to amend the act respecting labour standards and other legislative provisions], *Le personnel domestique : les conditions de travail et la protection legislative* [Domestic workers: working conditions and legislative protection], Government of Quebec, 1990, p. 3.

19 See the CITIZENSHIP AND IMMIGRATION CANADA brochure, *Information for Employers and Live-in Caregivers from Abroad: The Live-in Caregiver Program*, Ottawa: Department of Public Works and Government Services, 1999, p. 2.

field of work once they have obtained permanent residence, which constitutes an implicit acknowledgment that the working conditions are less than desirable.

As for the Government of Quebec, as we shall see, it contributes to non-recognition of work done by live-in caregivers by excluding them from the protection of certain labour and social legislation.

PART I THE LIVE-IN CAREGIVER PROGRAM

The LCP, one of the special immigration programs, is designed to fill a need for workers in this field in Canada. It allows foreigners to work in Canada as live-in caregivers for a specified period of time, in return for which Canada offers them permanent residence. We shall analyse the operation of this program from the point of view of the women participating in it. We wish to determine the extent to which it does or does not contribute to the exploitation and trafficking of women in Canada.

We shall first present a general overview of the ways of immigrating to Canada and the operation of the program (1), followed by a critique and proposals for reform (2).

1 Immigration to Canada: From the General to the Specific

Since 1970, Canadian immigration policy has been based on a point system. However, it also maintains special immigration programs allowing foreigners to work in Canada in certain areas experiencing a labour shortage, without being subject to the point system. The LCP is one of those special programs. To better comprehend the legal status of an immigrant live-in caregiver, we shall first briefly describe the overall Canadian immigration system (1.1), and then look specifically at the LCP (1.2).

1.1 The Canadian Immigration System

Foreign nationals seeking to enter Canada are divided into two classes: they are either immigrants or visitors.[20]

Immigrants are divided into three categories: independent class, family class and refugee class.

Immigrants in the independent class include investors, entrepreneurs, self-employed workers, skilled workers and any other person who makes an application for immigration. To obtain permanent residence, applicants are assessed on the basis of the following selection criteria:[21] education (a maximum of 16 points is awarded for this factor),[22] specific vocational training (a maximum of 18 points is awarded for this factor),[23] experience (a maximum of 8 points is

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20 See the Citizenship and Immigration Canada Web site: http://www.cic.gc.ca (accessed on June 26, 2000); Donald GALLOWAY, *Immigration Law*, Concord, Ontario: Irwin Law, 1997, p. 42.

21 The Department of Citizenship and Immigration Canada provides a self-assessment form for persons wishing to submit an application as an independent immigrant. See http://www.cic.gc.ca/english/immigr/guide-ce.html (accessed on June 26, 2000). See ss. 8 and 9(1) and Schedule I of the *Immigration Regulations, 1978,* SOR/78-172, (1978) 112 Gaz. Can. II. 757.

22 Schedule I, factor 1, *Immigration Regulations, 1978, idem.*

23 Factor 2, *supra*, note 21.

awarded for this factor),[24] occupational demand (a maximum of 10 points is awarded for this factor),[25] arranged employment or designated occupation (a maximum of 10 points is awarded for this factor),[26] Canadian demographic factor (8 points are automatically awarded under this factor),[27] age (a maximum of 10 points is awarded for this factor),[28] knowledge of English and French languages (a maximum of 15 points is awarded for this factor),[29] and relatives in Canada (a maximum of 5 points is awarded for this factor).[30] An applicant must score at least 60 points for the first nine factors. Additional points may be awarded at an interview, where personal suitability (adaptability) is assessed (a maximum of 10 points is awarded for this factor).[31] An applicant must score a minimum of 70 points to be accepted as an independent immigrant.[32] In addition to these criteria, health[33] and good character[34] requirements must be met. Pursuant to the Canada-Quebec Accord,[35] Quebec has its own selection criteria for foreign nationals.

Family-class immigrants include people sponsored by a close relative in Canada who formally undertakes to be responsible for their financial support. Family-class applicants do not have to qualify under the point system, but must still meet the health and good character criteria.

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24 Factor 3, *supra*, note 21.

25 Factor 4, except for entrepreneurs and investors: s. 8(1)(c) of the *Immigration Regulations, 1978*, *supra*, note 21.

26 Factor 5, except for entrepreneurs, investors and self-employed workers: s. 8(1)(b) and (c) of the *Immigration Regulations, 1978*, *supra*, note 21.

27 Factor 6, *supra*, note 21.

28 Factor 7, *supra*, note 21.

29 Factor 8, *supra*, note 21.

30 Factor 9, *supra*, note 21.

31 Section 9(1)(i) to (iii) of the *Immigration Regulations, 1978*, *supra*, note 21.

32 An entrepreneur or investor must score a minimum of 25 points; see s. 9(1)(i) to (iii) of the *Immigration Regulations, 1978*, *supra*, note 21.

33 Section 19(1)(a), *Immigration Act*, supra, note 12. All immigrants must undergo a medical examination, pursuant to s. 11, *Immigration Act*, *supra*, note 12, and s. 22, *Immigration Regulations, 1978*, *supra*, note 21.

34 Section 19(1)(c) to 19(1)(c.2), *Immigration Act*, *supra*, note 21.

35 See *supra*, note 13. See *Regulation amending the regulation respecting the selection of foreign nationals*, D. 597-2000, May 17, 2000, G.O.Q. II. 2963; *Regulation respecting the weighting applicable to the selection of foreign nationals*, A.M., April 17, 2000, G.O.Q. 2000. II. 2805. The Ministère des Relations avec les citoyens et de l'Immigration du Québec provides a preliminary immigration questionnaire; see http://www.immq.gouv.qc.ca (accessed on May 9, 2000).

Immigrants admitted as refugees are persons who are fleeing persecution. Some refugees are selected abroad for resettlement in Canada; others claim refugee status once they are in Canada.

Immigrants accepted into Canada in one of these three classes will be granted permanent residence. They may apply for Canadian citizenship after residing in Canada for three years.

Visitors are persons who are present in Canada for a temporary stay of up to six months and who do not intend to immigrate to Canada.[36] This category includes tourists, people visiting relatives in Canada, business travellers, students and temporary workers. They may apply for an extension of their visitor status. They must have a work permit in order to work. To obtain it, they must prove that no other Canadian or permanent resident could fill the position.

1.2 Canada's Live-in Caregiver Program

Before analysing the aims and operation of the Foreign Domestic Movement (FDM) Program, in effect from 1981 to 1992 (1.2.2), and the present LCP (1.2.3), we shall provide a profile of a live-in immigrant caregiver and her employers (1.2.1).

1.2.1 Profiles

To better understand the aims of the LCP and the unequal nature of the relationship between an immigrant live-in caregiver and her employers, it is necessary to compile a profile of this worker in Canada across the centuries (1.2.1.1), as well as that of her employers (1.2.1.2).

1.2.1.1 Profile of an immigrant live-in caregiver

Over the centuries, the profile of immigrant caregivers has changed considerably. As historical analyses demonstrate,[37] the ethnic composition of this group of women has played a major role in the deterioration of their legal status and working conditions. Compared with white domestics, women who were not of British origin, and particularly women of colour, enjoyed fewer rights and their employment opportunities were limited.

In the 18th and 19th centuries, Aboriginal women and female black slaves filled the need for domestic workers in Canada. In the early 20th century, domestic workers were recruited among young British women. Although they were hired as domestics, they were regarded as

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36 Section 2(1), *Immigration Act, supra*, note 21.

37 On the history of caregivers in Canada, see Sedef ARAT-KOÇ, "From Mothers of the Nation to Migrant Workers," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 53; Audrey MACKLIN, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 *McGill L.J.* 683, p. 687 ff.; Tanya SCHECTER, *Race, Class, Women and the State: The Case of Domestic Labour*, Montréal: Black Rose Books, 1998, p. 185; Patricia M. DAENZER, *Regulating Class Privilege: Immigrant Servants in Canada, 1940s-1990s*, Toronto: Canadian Scholars' Press Inc., 1993.

future wives who could establish a household, populate Canada and ensure the survival of British culture. At that time, over one third of domestics in Canada were of foreign origin, three quarters of them from Great Britain.

As Great Britain could not satisfy the demand for domestics in Canada, women from other countries had to be considered. Beginning in the 1920s, large numbers of domestics came here from the Scandinavian countries, especially Finland, and from Central or Eastern Europe, including Poland, Romania, Hungary and the Soviet Union. These women came to work in the Canadian Prairies. Between 1947 and 1952, Canada received 165,000 displaced people in the wake of the Second World War, on condition that they work for one year in specific occupations, such as farming, mining or forestry for men, and domestic work (either in hospitals or private homes) for women. Beginning in 1950, the demand for domestic workers could no longer be satisfied by these refugees. Canada then turned to the southern European countries, such as Italy and Greece. When Europe could not meet the demand for domestic workers, Canada had to consider Jamaica and Barbados. A special program to attract domestics from those countries was in effect from 1955 to 1967. Those recruited were granted permanent residence and, in return, they were required to work as domestics for one year. In 1967, the point system was instituted as the basis of Canadian immigration policy.

In 1973,[38] the Government of Canada adopted a temporary work permit system that required domestic workers to work for a specific employer. It no longer granted them permanent resident status, as before. After working in Canada for an average of three years, domestics were required to return to their countries of origin. During the 1970s, domestics came mainly from the Caribbean. After that, they were from the Philippines.

At present, 76.92 percent of immigrant live-in caregivers arriving in Canada under the LCP come from the Philippines.[39] More than 80 percent are women.[40] They are unmarried, and their average age is 30. The majority of them, about 60 percent, settle in Ontario, specifically in the greater Toronto area. About 15 percent choose to settle in Quebec.[41] According to some

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38 On the history of immigrant live-in caregivers in Canada from 1970 to 1990, see T. SCHECTER, *idem*, p. 111 ff.

39 According to the 1997 figures. See CITIZENSHIP CANADA, *Work permits for live-in caregivers by country and province, from 1992 to 1997*, quoted in M. BALS, *supra*, note 14, p. 194, table 10. For a profile of female workers from the Philippines, also see M. BALS, *supra*, note 14, p. 194 ff.

40 See *Tableaux sur l'immigration au Québec, 1995-1999*, Direction de la planification stratégique, Ministère des Relations avec les citoyens et de l'Immigration du Québec, March 2000, document obtained at http://www.immq.gouv.ca (accessed on May 6, 2000).

41 See *Tableaux sur l'immigration au Québec, 1995-1999*, *idem*, p. 5. In 1998, 344 immigrant live-in caregivers settled in Quebec, i.e., 14 percent of all those who arrived in the country through the federal program.

studies, they are relatively well educated.[42] Women from the Philippines seem to be preferred by Canadian employers as they have a reputation for being dedicated and stable.[43]

The migratory objective of Filipino women is quite clear.[44] They arrive in Canada under the LCP. This program is their only door into the country because, since they cannot take reserved employment or a designated occupation and lack sufficient education, it would be difficult for them to immigrate to Canada as a member of the independent immigrant class. They want to immigrate to Canada to secure a better future for themselves and their families. In fact, caregivers from the Philippines support a third of the population of that country. Three million women working overseas (most of them caregivers) send $5 billion home to their country, managing to support about 20 million people in a country with a total population of 65 million.[45]

Women from other countries also immigrate to Canada as live-in caregivers, particularly from the former Soviet Union and Eastern Europe. Their migratory objective differs from that of women from the Philippines. Their purpose is not to subsidize the needs of their families but rather to earn a living, which is not possible in their home countries despite their high levels of education. Even if they do not really want to work as live-in caregivers, the program offers them a chance to immigrate to Canada.[46]

Two conclusions can be drawn from this brief historical profile of the live-in immigrant caregiver in Canada. First, over the decades, various recruiting efforts did not succeed in meeting the need for domestics. Workers abandoned that field for the same reasons as today: low pay, long hours, difficult work, absence of social recognition, and lack of privacy and autonomy. Second, conditions for immigration and work were tightened and became less

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42 According to its research, WEST COAST DOMESTIC WORKERS' ASSOCIATION states that its members, especially those of Philippine origin, are highly educated. See *supra*, note 2, p. 8.

43 This is what the placement agencies say. See Abigail BAKAN and Daiva K. STASIULIS, "Making the Match: Domestic Placement Agencies and the Racialization of Women's Household Work," (1995) 20 *Signs* 303.

44 See M. BALS, *supra*, note 14, p. 144.

45 See Adelle BLACKETT, *Making Domestic Work Visible: The Case for Specific Regulation*, International Labour Organization, Labour Law and Labour Relations Branch, 1998, p. 4, note 15. See also Abigail B. BAKAN and Daiva K. STASIULIS, "Structural Adjustments, Citizenship, and Foreign Domestic Labour: The Canadian Case," in Isabella BAKKER, ed., *Rethinking Restructuring: Gender and Change in Canada,* Toronto: University of Toronto Press, 1996, p. 217.

46 See WEST COAST DOMESTIC WORKERS' ASSOCIATION, *supra*, note 2, pp. 9, 10.

attractive, while at the same time the ethnic composition of this group of workers was changing. Some authors do not hesitate to call the situation discriminatory.[47]

1.2.1.2 Profile of employers

Few studies have dealt with the employers of live-in caregivers. Today's typical employers are a couple who are working, 35 years of age on the average, with two children, involved in the business sector, with a gross annual income of at least $100,000.[48] The employers wish to hire a live-in caregiver to look after their household chores and children, so as to enable them to devote themselves to their paid employment.

1.2.2 The Foreign Domestic Movement Program (1981-1992)

To put the present LCP, which dates from 1992, into perspective, we shall briefly describe its predecessor, the Foreign Domestic Movement (FDM) program,[49] in effect from 1981 to 1992. This program was adopted following the mobilization of immigrant caregiver rights groups demanding greater protection and respect for domestic workers, who, since 1973, had been coming to work in Canada on a temporary basis and were required to return home upon the expiry of their work permits. As in the past, the FDM was intended to fill the need for childcare. However, to ensure that the women worked as live-in caregivers for a certain length of time, it imposed conditions on them that did not apply to other immigrant workers. On the other hand, it allowed them to apply for permanent residence without leaving Canada.

A foreign worker who wanted to come to Canada under the FDM had to meet the following requirements for admission.[50] Before arriving in Canada, she had to secure an offer of employment as a live-in caregiver from a Canadian employer. She could obtain the offer of employment through employment agencies in her home country, or through friends or family members already in Canada. To find a live-in caregiver, employers would also use the services of an employment agency. The offer of employment had to be "validated" by a Canada Human Resources Centre, i.e., the future employers had to prove that no other Canadian or permanent resident, with the skills they required, could fill the position.

Next, the applicant had to have recognized formal training in the domestic and/or childcare field, or have a minimum of one year of satisfactorily rated, full-time paid employment as a domestic. She had to have a level of education sufficient to perform the duties in the job offer. She had to demonstrate that she was able to communicate orally in English or French, be in

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47 See S. ARAT-KOÇ, *supra*, note 37.

48 See M. BALS, *supra*, note 14, p. 41, table 6, and p. 195, table 11 (profile of employers based on a number of Canadian studies). See also the survey of employers of caregivers in the Montréal region in 1991, conducted at the request of the Ministère des Communautés culturelles et de l'Immigration, which was referred to by the COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, p. 26.

49 For a legal analysis, see A. MACKLIN, *supra*, note 37; Jennifer AITKEN, "A Stranger in the Family: The Legal Status of Domestic Workers in Ontario," (1987) 5 *U. of T. L. J.* 394.

50 See M. BALS, *supra*, note 14, p. 35; A. MACKLIN, *supra*, note 37, p. 696 ff.

good health and not have a criminal record. She had to demonstrate personal qualities such as resourcefulness, maturity and stability, and initiative. These prerequisites were verified at an interview with a visa officer at the Canadian diplomatic mission in the country where the worker was living. If she met all the requirements, she was asked to sign a contract setting out the conditions of employment. The contract specified that the employer had to provide $20 per month and three hours per week to allow the worker to upgrade her skills. She was also obligated to work for the employer whose name appeared on the work permit, and to reside in the home of the employer for a period of two years. The Immigration Department then issued her an employment authorization valid for one year, which she had to have renewed thereafter.

As we noted earlier, immigration is an area of shared jurisdiction in Canada, in respect of which the federal government and the provinces may both legislate. Quebec, the only province to have occupied this field, imposed its own admission criteria on women wishing to work there. In addition to securing a "validated" offer of employment as a live-in caregiver with a Canadian employer before arriving in Canada, the woman had to show that she had nine years of education and at least one year of paid work experience, could speak English or French, was in good health and did not have a criminal record. She was required to work for the employer whose name appeared on her work permit, and live in the home of that employer for two years.

After working as a live-in caregiver for two years, the worker could apply for permanent residence without leaving Canada. In addition to being in good health and not having a criminal record, she had to meet the following seven selection criteria.[51] In the experience category, her productivity had to be satisfactory. She had to be able to speak and write French or English, demonstrate financial security by savings in the bank, and produce certificates attesting to the fact that she had successfully upgraded her skills. She had to prove that she had adapted to Canadian society through contact with members of the community or participation in activities by becoming a member of ethnic, cultural, religious or recreational associations. She also had to demonstrate that she possessed the personal attributes suitable for becoming a permanent resident, namely, adaptability, motivation, initiative, resourcefulness and any other such qualities. Finally, an assessment was conducted as to whether admission of her spouse and dependent children might adversely affect the worker's ability to become established financially, except in the case where the dependants intended to enter the work force immediately.

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51 See M. BALS, *supra*, note 14, p. 39. For a critique of these criteria, see A. MACKLIN, *supra*, note 37, p. 731 ff; Sedef ARAT-KOÇ, "Immigration Policies, Migrant Domestic Workers and the Definition of Citizenship in Canada," in Vic SATZEVICH, ed., *Deconstructing a Nation: Immigration, Multiculturalism and Racism in '90s Canada*, Halifax: Fernwood Publishing, 1992, p. 229.

1.2.3 The 1992 Live-in Caregiver Program

Like the 1981 program, the purpose of the LCP of 1992 was to remedy the shortage of live-in caregivers in Canada.[52] However, in addition to being a response to the need for childcare, it also addresses the need for care for those who are elderly, disabled or sick. This new program differs from its predecessor in two ways. First, the government has raised the training requirements. It justifies this change by the fact that these workers, who are better educated, will have less difficulty finding work when they are granted permanent residence. Second, the government has amended the criteria for obtaining permanent residence, which were considered unfair by those involved since they did not apply to other immigrant workers whose occupation was in great demand.[53] The two requirements of residence in the employer's home and a work permit naming the employer still apply. Let us look at the eligibility criteria, which vary according to whether the worker settles in Quebec or the other Canadian provinces.

The LCP allows a foreigner to work as a live-in caregiver in Canada. "Live-in caregiver" means a person who provides, without supervision, in a private household in Canada in which the person resides, childcare, senior home support care or care of the disabled, and who does the housework.[54] The definition excludes people who do only housework.

To be eligible for the LCP, a person must meet the following requirements.[55] As was the case under the FDM, she must first have a validated offer of employment from a Canadian employer before arriving in Canada. A "validated offer of employment" is an offer, assessed

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52 On the subject of this shortage, see the brochure published by CITIZENSHIP AND IMMIGRATION CANADA, *supra*, note 19, p. 1. The need for live-in caregivers was confirmed in a telephone conversation with an information officer at the Department of Citizenship and Immigration Canada on February 21, 2000. See also *Turingan* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1234 , DRS 94-03832, Action No. IMM-1694-93, in which the judge pointed out that the purpose of this program was to fill a void in the Canadian labour market. There is also a shortage in the United States, as the "Nannygate" case illustrated. In 1993, Zoe Baird was forced to withdraw as a candidate for Attorney General of the United States because she had employed a caregiver who was an illegal immigrant. Ms. Baird's situation is not unique. It reflects the need for caregivers and the significance of black market labour in this area in the United States. On the difficulty of obtaining a work permit as a caregiver in the United States, see Melvin R. SALOMON, "Between a Rock and a Hard Place: An Explanation of the Immigration Issues Facing Employers of Domestic Workers," *New Jersey Lawyer*, February-March 1995, p. 40. The waiting period is said to be 10 years. See also K. DELANEY, *supra*, note 4.

53 See Abigail B. BAKAN and Daiva STASIULIS, "Foreign Domestic Worker Policy in Canada and the Social Boundaries of Modern Citizenship," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, pp. 29, 35.

54 Section 2(1), definition of "live-in caregiver," *Immigration Regulations, 1978*, *supra*, note 21.

55 See the CITIZENSHIP AND IMMIGRATION CANADA, brochure, *supra*, note 19, pp. 2, 3. See s. 20(1.1), *Immigration Regulations, 1978*, *supra*, note 21.

by a Canada Human Resources Centre, for a job that cannot be filled by a Canadian or an immigrant worker already in Canada who has the necessary skills. If the would-be employers reside in Quebec, they must demonstrate that the hiring of the person is not and will not be detrimental to the hiring of residents of that province.[56] The Canada Human Resources Centre also verifies the financial resources of the future employers and whether they have sufficient space in their home to accommodate the caregiver. Usually, a person who is interested in working as a live-in caregiver has heard about the LCP from family or friends, or is dealing with an employment agency in her home country, just as would-be employers very often approach an agency in Canada.

In comparison with the earlier program, the government has also raised training requirements. The worker must have completed the equivalent of a Canadian high school education, and must have one year of experience in paid employment in a field related to the job,[57] including six months of satisfactorily rated continuous employment with one employer in the three years immediately prior to applying for the employment authorization, or must have completed at least six months of recognized formal full-time training in a field related to the job[58] for which the employment authorization is being sought. Because a caregiver must be capable of working independently when the parents or people in charge are absent, she must be able to speak, read and understand either English or French.[59] Like any other applicant who wants to immigrate to Canada, she must be in good health and not have a criminal record. These prerequisites are verified at an interview with a visa officer at the Canadian diplomatic mission in the country where the worker is living. If the medical and security requirements are met, the Government of Canada issues an employment authorization, which costs $150. The work permit is valid for one year and must be renewed before it expires. The worker may not bring any family members with her to Canada.

In view of Quebec's power to legislate on immigration, the conditions vary somewhat for a worker who wishes to settle in Quebec. In addition to having a "validated" offer of employment, she must have successfully completed 11 years of elementary and secondary school; she must have acquired at least six months of work experience in the five years preceding the application for a Certificat d'acceptation du Québec [Quebec acceptance certificate] (C.A.Q.) in this type of employment, or have taken at least six months of vocational training in a vocational school for this type of employment; she must understand French or English and be able to express herself orally in one of those languages; she must

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56 Section 50, *Regulation respecting the selection of foreign nationals*, *supra*, note 7; s. 20, *Immigration Regulations, 1978*, *supra*, note 21.

57 In early childhood education, geriatric care, pediatric nursing or first aid.

58 In early childhood education, geriatric care, pediatric nursing or first aid.

59 On the three criteria of education, work experience and language proficiency, see John W. PETRYKANYN, "Opening and Closing the Nanny Gate," (1994) 6 *Immigration and Citizenship*, No. 3, p. 1.

have signed a contract of employment with the employers;[60] and she must be in good health and not have a criminal record.[61] If she meets those conditions and pays the $100 fee, the Government of Quebec will then issue a Quebec acceptance certificate, which is valid for 14 months. After that, if the medical and security requirements are met, the Government of Canada will issue an employment authorization, which costs $150. This work permit is valid for one year and must be renewed before it expires.

For a worker who settles in Quebec or elsewhere in Canada, the requirements described above will be accompanied by the requirement that she live in the home of the employers,[62] to make up for the shortage of workers in this field. As well, she must work as a caregiver only in the home of the employers whose names appear on her employment authorization, for 24 months out of a three-year period.[63] Three years are allotted for completing the 24 months of work to allow for illness or change of employers, or other unforeseen circumstances interfering with her work. The worker may not work part-time in another field or pursue post-secondary courses during that period. Her status during this time is similar to that of a visitor.

If the caregiver resigns or is dismissed, she must first find other employers who have had their offer of employment validated, and then obtain a new federal work permit and a new C.A.Q., if she is working in Quebec, for which she must pay the prescribed fees. During the waiting period, which may be a month, she may not work. To do so would be illegal and could result in her exclusion from Canada. Despite a change of employers, she must complete the 24-month period within the three years.

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60 Other provinces also require that this kind of contract be signed. See, in British Columbia, s. 14, *Employment Standards Act*, R.S.B.C. 1996, c. 113.

61 See *Guide à l'intention des aides familiales résidantes*, *supra*, note 14.

62 S. 2(1), definition of "live-in caregiver," *Immigration Regulations, 1978*, *supra*, note 21.

63 S. 2(1)(iii), definition of "member of the live-in caregivers in Canada class," *Immigration Regulations, 1978*, *supra*, note 21.

FDM (1981-1992)	LCP (since 1992)
— a validated offer of employment as a live-in caregiver from a Canadian employer	— a validated offer of employment as a live-in caregiver from a Canadian employer
— sufficient education to perform the duties required	— successful completion of the equivalent of a Canadian high school education
— a minimum of one year of full-time paid work experience	— one year of paid work experience in a field related to the job, including six months of satisfactorily rated continuous employment with one employer, within the three years immediately prior to applying for a work permit
— or recognized formal training in domestic work or childcare	— or at least six months of recognized formal full-time training in a field related to the job for which the work permit is sought
— ability to communicate orally in English or French	— ability to speak, read and understand English or French
— good health	— good health
— no criminal record	— no criminal record
— demonstrate personal qualities such as resourcefulness, maturity, stability and initiative	
— work in the home of the employer whose name appears on her work permit	— work in the home of the employer whose name appears on the work permit for 24 months during a three-year period
— live in the employer's home for two years	— live in the employer's home for two years
For Quebec	**For Quebec**
— a validated offer of employment as a live-in caregiver from a Canadian employer	— a validated offer of employment as a live-in caregiver from a Canadian employer
— nine years of education	— successful completion of 11 years of elementary and secondary school
— at least one year of paid experience	— at least six months of work experience in this type of occupation acquired within five years preceding the application for a Quebec acceptance certificate, or at least six months of occupational training in a vocational

FDM (1981-1992)	LCP (since 1992)
	school for this type of employment
— fluency in oral English or French	— ability to speak, read and understand English or French
— good health	— good health
— no criminal record	— no criminal record
— work in the home of the employer whose name appears on the work permit	— work in the home of the employer whose name appears on the work permit for 24 months during a three-year period
— live in the employer's home for two years	— live in the employer's home for two years

After having worked as a live-in caregiver for 24 months during the three years following her arrival in Canada, the worker may apply for permanent residence without having to leave the country. The cost of such an application is $1,475, including $500 to process the application and $975 to obtain permanent residence. Immigration authorities take into account the following criteria. First, the caregiver must have complied with the eligibility requirements, namely, living in the employers' home and doing domestic work for 24 months in the past three years. Next, she must not have lied regarding her education, her family status or her experience; neither she nor her spouse nor her dependent children can have a criminal record or a serious health problem. Unlike the FDM, under the LCP the caregiver's financial situation, vocational upgrading since her arrival in Canada, volunteer work, marital status or number of dependants are not taken into consideration. The waiting period to obtain permanent residence is between 12 and 18 months, during which time the applicant must continue to work as a caregiver because she will not yet have an open work permit allowing her to change occupations. If the caregiver is working in Quebec, her fluency in French will be verified[64] before the Certificat de sélection du Québec is issued. If she does not meet the criteria for permanent residence, she must return to her country of origin.

2 Critique of the Live-in Caregiver Program

Having set out the general provisions for immigrating to Canada and the special provisions for immigrant live-in caregivers, we shall now proceed to the critical portion of our study. We shall begin with an analysis of the weaknesses of the program (2.1), which brings us to the question of whether the federal program should be retained or abolished (2.2). We then suggest improvements to the program (2.3) and discuss the usefulness of an action for infringement of equality rights (2.4).

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[64] Work contract for live-in caregivers, *supra*, note 7, the standard contract required by the Government of Quebec; clause 6 states: [TRANSLATION] "The employer agrees to facilitate the employee's access to French-language courses outside normal working hours."

2.1 Weaknesses of the Program

The LCP has been, and continues to be, the object of much criticism by community groups active in this field. We shall address the issue of temporary status (2.1.1), the 24-month work period (2.1.2), the requirement that the caregiver live in the employers' home (2.1.3) and other weaknesses (2.1.4).

2.1.1 Temporary Status

During the 24-month period that a worker spends as a live-in caregiver, which must be completed within a three-year period, she has only temporary status. The temporary status continues until she obtains her permanent residence, which may take from 12 to 18 months from the time her application is filed. At best, temporary status lasts for three years (24 months of performing domestic work and 12 months of waiting). The foreign caregiver cannot be characterized as an immigrant or a visitor. She is not an immigrant because she cannot apply for permanent residence before completing 24 months of work as a live-in caregiver within a three-year period. Instead, she is considered a visitor. However, she is not really a visitor because she intends to immigrate to Canada.

During this period, she must work only as a caregiver in the home of the employers whose name appears on her work permit.[65] She cannot work, for example, in her employer's business at the employer's request as doing so could lead to deportation.[66] If she wants to change employers, as happens at least once in 70 percent of cases,[67] she must pay the fees and obtain a new work permit, specifying the name of the new employers, who have had their offer of employment validated by a Human Resources Centre. It takes an average of one month to obtain a new work permit. Any delay in finding a new employer, or any delay caused by the former or new employer in providing the necessary documents, will postpone the possibility of applying for permanent residence at the end of the 24 months by a corresponding length of time.[68] During the delay occasioned by a change of employers, she cannot work because she has no work permit. Any time she spends working for a trial period without a work permit cannot be counted as part of the required 24-month period. Even though she is paying into

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65 See the testimony of Miriam ELVIR, "The Work at Home is not Recognized: Organizing Domestic Workers in Montréal," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 147. Elvir said that she felt like an object belonging to her employer when she saw the employer's name on her work permit, p. 156.

66 See *Bernardez* v. *Canada (Minister of Citizenship and Immigration)* (1995), 31 *Imm. L.R.* (2d) 90 (F.C.T.D.).

67 According to the COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, p. 28.

68 See, for example, the problems caused by the failure to renew a work permit when a worker changes employers: *Peje* v. *Canada (Minister of Citizenship and Immigration)* (1997), 37 *Imm. L.R.* (2d) 270 (F.C.T.D.); *Baquial* v. *Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 778 (F.C.T.D.) (Q.L.).

the employment insurance scheme, she cannot take advantage of it because she must find an employer as soon as possible or leave the country. In addition to complications caused by changing jobs, there may be problems resulting from a pregnancy or the birth of a child during the period of temporary status.[69] In these circumstances she must obtain a medical certificate to justify taking off time for the delivery and, in order to complete the 24 months of work, she will have to find childcare, which could constitute a significant financial obstacle.

This precarious status, creating a situation of vulnerability and a captive work force, leads to abuse. For instance, some workers may tolerate exploitation in order to avoid changing employers.[70] The situation has led to the conclusion that these women were "good enough to work, but not good enough stay," i.e., not good enough to be permanent residents.[71]

According to several authors, temporary status is a form of sexual and ethnic discrimination.[72] To begin with, it is sexual discrimination against women. Although other workers are also given only temporary status (for example, in the case of the program for seasonal agricultural workers), the LCP discriminates against these women because of the harmful effects it has on them. First, it is not mere chance that the vast majority of the program participants are women. Second, domestic work is a field traditionally reserved for women, underpaid and unrecognized. In addition, domestic workers have historically been less favourably treated than other workers. The LCP treats program participants this way because they are women. As for ethnic discrimination, historical analyses of the various waves of immigrant caregivers arriving in Canada demonstrate that the treatment by immigration law of visible minority workers, such as those from the Caribbean and the Philippines, has been less favourable compared to that accorded the workers who preceded them, such as those from Great Britain. In the 1970s, when Canada turned to the Caribbean to satisfy its need for domestic workers, it stopped granting permanent residence to the women recruited, offering them only temporary status.[73]

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69 See *Pagal* v. *Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1180 (F.D.T.D.) (Q.L.); *Nuera* v. *Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 577 (F.C.T.D.) (Q.L.).

70 See, in the newsletter *Domestics' Cross-cultural News* (Toronto: Intercede, November 1999), the story of Leticia, a Filipina who was ordered deported because she was neither working nor living in the home of the employer whose name appeared on her work permit.

71 The slogan "Good Enough to Work, Good Enough to Stay" was used in the late 1970s in the campaign to improve the working conditions of immigrant live-in caregivers. See T. SCHECTER, *supra*, note 37, p. 115; S. ARAT-KOÇ, *supra*, note 1, p. 91; Rachel EPSTEIN, "Domestic Workers: The Experience in B.C.," in Linda BRISKIN and Lynda YANZ, eds., *Union Sisters: Women in the Labour Movement*, Toronto: The Women's Press, 1985, pp. 223, 231.

72 See Abigail B. BAKAN and Daiva STASIULIS, "Introduction," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 3.

73 See S. ARAT-KOÇ, *supra*, note 37, pp. 53, 72 ff.

2.1.2 The 24-Month Work Period

The present LCP requires that participants complete 24 months of domestic work within a three-year period before they may apply for permanent residence. Like temporary status, the obligation to work as a live-in caregiver for 24 months is a source of abuse. If the worker is immediately granted permanent residence, as we recommend, is it necessary to require that she complete 24 months of domestic work? Again, if the worker is immediately granted permanent residence, as we recommend, what other type of worker having permanent residence is compelled to work for a specific time period in a given field? This amounts to discrimination against these workers.

2.1.3 The Obligation to Live in the Employers' Home

It is mandatory that the caregiver live in the home of her employers during the 24-month period. According to the Department of Citizenship and Immigration Canada, the requirement that the worker live in the employers' home is intended to satisfy the need for *live-in* caregivers.[74] Nevertheless, this situation can lead to abuses,[75] such as unpaid or excessive working hours, violations of privacy, greater dependence on employers, sexual harassment and sexual assault. In fact, the Department of Citizenship and Immigration Canada itself acknowledges this possibility in the information brochure it distributes to women who participate in the program.[76]

2.1.4 Other Weaknesses

The requirements of the LCP with respect to education and health are also open to criticism. In the first place, the worker must have completed the equivalent of a Canadian high school education. Since that condition was imposed in 1992, when the new program came into effect, the number of participants admitted to the LCP has declined significantly. Because of systemic discrimination, women from Third World countries have less access than men to educational resources. This new requirement therefore harms the chances of admission for women from certain countries. Furthermore, like others wishing to immigrate to Canada, a worker who wants to participate in the LCP must be in good health. Due to systemic discrimination, women from developing countries may not always have access to health

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74 See CITIZENSHIP AND IMMIGRATION CANADA, brochure, *supra*, note 19, p. 3. See also "Application for Hiring a Foreign Live-in Caregiver," published by Human Resources Development Canada, Part IV ("The employer's efforts to recruit Canadian or foreign workers already in Canada").

75 For an example of abuse arising from the obligation to live in the employers' home, see *Turingan* v. *Canada (Minister of Employment and Immigration), supra,* note 52. In that case, for health reasons the live-in caregiver ate her meals and spent the night at the home of a friend but went to work every morning in her employers' home, continued to pay room and board, kept her personal belongings there, and received her mail there. The Court set aside the order that she return to her home country and directed the immigration officers to reconsider their decision in view of Ms. Turingan's reasons. See John W. PETRYKANYN, "The Uneasy Landing of Mary Poppins," (1994) 6 *Immigration and Citizenship,* No. 4, p. 1.

76 See CITIZENSHIP AND IMMIGRATION CANADA, brochure, *supra*, note 19, p. 12, sections entitled "If You Need Help" and "What Is Abuse?"

care. The good health requirement as an immigration criterion may therefore reduce the chances of immigrating for some women. These two requirements, namely, education and good health, are clearly discriminatory in the case of the women who are the subject of this study. However, we have not taken a position on these issues, being beyond the scope of this study since they go to the very foundations of the Canadian immigration system.

We have described three aspects of the LCP, namely, temporary status, the 24-month work period and the obligation to live in the employer's home. These three are criticized the most, and violate the fundamental rights of the workers in question.

2.2 To Retain or Abolish the Federal Program

In view of the constant criticism of the LCP, we must ask whether it should be retained or abolished. Apart from certain problems with the program, which could be corrected to a certain extent, some fundamental issues are at stake.[77] In ethical terms, how do we justify the existence of such a program in the current climate of globalization? What are the benefits for Canadians? Is this a form of affirmative action to assist women who would find it difficult to immigrate to Canada otherwise? What are the needs of the Canadian labour market? How can we respect the fundamental rights of these women? Before we analyse the arguments for retaining (2.2.2) or abolishing (2.2.3) the LCP and declare our position (2.2.4), we shall present some statistics (2.2.1).

2.2.1 Some Statistics

First of all, statistics can shed some light on this debate. At present, the LCP affects a small number of women. Only 2,435 women were accepted into the program in 1995, 2,088 in 1996 and 2,453 in 1997, as compared with 16,664 in 1991, before the LCP was instituted.[78] This decline may be explained by the fact that the new requirements added to the program in 1992 (including more extensive education) are met by fewer and fewer women wishing to immigrate and interested in domestic work.[79] We should note that every year, Canada admits

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77 See the report by the WEST COAST DOMESTIC WORKERS' ASSOCIATION, which contains a good statement of the issues raised by this question, *supra*, note 2, p. 3.

78 See the two tables comparing admissions to this program in M. BALS, *supra*, note 14, pp. 193 and 194. We were unable to obtain more recent statistics. From the Department of Citizenship and Immigration Canada, we obtained statistics relating only to applications for permanent residence by persons who had completed the program requirements. Some 4,661 women were admitted in 1995, 3,830 in 1996, 2,259 in 1997 and 2,449 in 1998. See *Facts and Figures: Immigration Overview*, *supra*, note 8, p. 100 ff.

Some 247 caregivers were admitted to Quebec in 1995, 625 in 1996, 389 in 1997, 344 in 1998, and 395 in 1999, or 1.4 percent of all the immigrants admitted to Quebec between 1995 and 1999. See *Tableaux sur l'immigration au Québec, 1995-1999*, *supra*, note 40, p. 5.

79 See, for example, *Khusardeo* v. *Canada (Solicitor General)*, [1995] F.C.J. No. 377 (F.C.T.D.) (Q.L.), a case in which the applicant from Guyana had not completed the12th grade of secondary school and was not accepted into the live-in caregiver program.

an average of 203,672 immigrants.[80] Hence, those arriving in Canada under the LCP now account for 1.4 percent of all immigrants. In 1991, they accounted for 8.18 percent. In total, we think that between 7,000 and 8,000 women are currently participating in the LCP.[81]

However, we have to look beyond the official figures. There are a number of reasons to believe that large numbers of illegal immigrants work as live-in caregivers.[82] First, there is growing pressure on women in certain Third World countries to support their families,[83] and domestic work abroad is one of the only ways they can do so. In fact, a worldwide increase in the demand for this kind of work has been noted.[84] Furthermore, fewer women have been accepted under the LCP since its inception in 1992, but the needs of Canadian families for immigrant live-in caregivers has not diminished.[85] Indeed, it has been forecast that a significant percentage of international migration by women will occur clandestinely. In effect, women use illegal methods of immigrating more often than men because they have less money, less education and less access to information.[86] They enter Canada as tourists, asylum seekers, visitors or students, and upon the expiry of their visas they live here illegally. Therefore, even though few women are accepted into the LCP, others continue to arrive in Canada and work as illegal immigrant live-in caregivers. Although inconspicuous, their presence highlights the discrimination against women inherent in immigration policy.

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80 See *Tableaux sur l'immigration au Québec, 1995-1999*, *supra*, note 40, p. 3.

81 We could not obtain exact figures in this regard.

82 There are said to be 20,000 illegal immigrants in Canada. See Vincent MARISSAL, "20,000 'sans-papiers' au Canada, Grande réforme en vue pour faire le ménage et rassurer les Canadiens," *La Presse*, Montréal, April 7, 2000, p. A-6. See the case of the immigrant caregiver who had no work permit from 1985 to 1993, *Nuera* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 69.

83 On increased migration by women all over the world, see Lin Lean LIM, *The Analysis of Factors Generating International Migration: The Processes Generating the Migration of Women*, Technical Symposium on International Migration and Development, The Hague, Netherlands, June 29–July 3, 1998 (copy obtained from the author).

84 See Lin Lean LIM, *Flexible Labour Markets in a Globalizing World: The Implications for International Female Migration*, Geneva: International Labour Office, 1997 (copy obtained from the author), p. 12.

85 See Patricia M. DAENZER, "An Affair Between Nations: International Relations and the Movement of Household Service Workers," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, pp. 81, 104; Abigail B. BAKAN and Daiva STASIULIS, "Foreign Domestic Worker Policy in Canada and the Social Boundaries of Modern Citizenship," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, pp. 29, 39.

86 See L.L. LIM, *supra*, note 83, p. 11 ff.

2.2.2 Arguments in Favour of Retaining the Program

Some immigrant live-in caregiver rights groups want the LCP to be retained,[87] but with major improvements. They argue that the program is one of the few ways for these women to immigrate to Canada. In effect, the immigration rules are such that few Third World women immigrate to Canada in the independent immigrant class because they do not meet the selection criteria, such as education and experience relevant to the job market. With all its faults, the LCP gives them this opportunity. It also helps the family members of these women. First, their families benefit from the money the women send home. Second, they will be able to emigrate to Canada as family members once the women have been granted permanent residence. Finally, the LCP also helps the home countries of these women through the money they send back to their families.

If we compare the Canadian situation to that in other countries where immigrant live-in caregivers are employed, the LCP is certainly the program that ensures these women the most protection[88] and is one of the few that offer them the opportunity to apply for permanent residence. In addition, some women from the Philippines who participated in the LCP and then became permanent residents seem to be very satisfied.[89] They consider their sacrifice a

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87 The WEST COAST DOMESTIC WORKERS' ASSOCIATION in Vancouver and INTERCEDE in Toronto are in favour of retaining it. See WEST COAST DOMESTIC WORKERS' ASSOCIATION, *supra*, note 2; Sedef ARAT-KOÇ and Fely VILLASI, *Report and Recommendations on the Foreign Domestic Movement Program*, Toronto: Intercede, October 1990. Others have come out in favour of retaining it: Jennifer HYNDMAN, "Gender and Canadian Immigration Policy: A Current Snapshot," (1999) 19 *Les Cahiers de la femme* 6, p. 9.

88 On the situation of caregivers in Singapore, Hong Kong and Taiwan, see Graziano BATTISTELLA and Anthony PAGANONI, eds., *Asian Women in Migration*, Quezon City, Philippines; Scalabrini Migration Centre, 1996. On the situation in France, Spain and Zimbabwe, see A. BLACKETT, *supra*, footnote 45. On the situation in the U.K., see Bridget ANDERSON, *Britain's Secret Slaves: An Investigation into the Plight of Overseas Domestic Workers*, London, U.K.: Anti-Slavery International, Human Rights Series No. 5, 1993. On the abuse these women suffer in general, see Marjan WIJERS and Lin LAP-CHEW, *Trafficking in Women: Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution*, Utrecht, Netherlands: Foundation Against Trafficking in Women, 1997, p. 68 ff. On the abuse these women suffer in France, see Philippe BOUDIN, "Esclaves en France," *Géoactualité*, (1998) 230 GEO 47; Thiery PARISOT, "Quand l'immigration tourne à l'esclavage," *Le monde diplomatique*, June 1998, pp. 20-21.

89 See M. BALS, *supra*, note 14, p. 144 ff. However, the experience of Filipina nurses coming to Canada as live-in caregivers is much less positive. See PHILIPPINE WOMEN CENTRE OF BRITISH COLUMBIA, *Filipino Nurses Doing Domestic Work in Canada: A Stalled Development*, Draft Report, Vancouver, March 2000; PHILIPPINE WOMEN CENTRE OF BRITISH COLUMBIA, *Trapped: Holding onto the Knife's Edge, Economic Violence Against Filipino Migrant/Immigrant Women*, Vancouver, March 1997. The assessment by Moroccan women is less positive since their migratory objectives are different. They immigrate to improve their social and occupational status, a result not offered by working as live-in caregivers. See M. BALS, *supra*, note 14, p. 149 ff. In its report, the WEST COAST DOMESTIC WORKERS' ASSOCIATION reaches the same conclusion with regard to

fair exchange because, in return, they have access to a better future in Canada for themselves and their families.[90] The Canadian program is cited as a model to be followed.[91] In the United States, for example, a caregiver work permit is only temporary and does not allow the holder to apply for permanent residence.[92] In Britain, immigrant live-in caregivers are frequently exposed to abuse because of their lack of status. In the majority of cases these workers accompany their employers, who come from abroad, and they are considered members of the family. They have no work permits, are not covered by immigration rules and cannot change employers. They may become British citizens if they work for the same employer for four years. If the employer dismisses them, they lose this opportunity.[93]

Finally, this is one of the rare forms of power that these women possess. Their home countries and their families need their income, and look upon them as heroines.[94] Even for its defenders, however, retaining the LCP is justifiable only if improvements are made to the program.

2.2.3 Arguments in Favour of Abolishing the Program

The LCP has also been characterized as aberrant, anachronistic and neocolonialist.[95] Some immigrant caregiver rights groups are calling for its abolition.[96]

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workers from the Philippines. Workers from Eastern countries have a different point of view because their expectations were different; some of them thought they would work as au pairs, *supra,* note 2, pp. 9-10.

90 M. BALS raises the possibility that Filipinas do not really want to improve their working conditions since the employers would not be able to afford this and the demand for foreign caregivers would decrease. In addition, Canadian women would choose this kind of employment if the working conditions were better. The objective of these foreign women is to immigrate and then bring over their families. See *supra*, note 14, p. 188.

91 See B. ANDERSON, *supra*, note 88, p. 89, who cites Canada as a model to be followed.

92 See K. DELANEY, *supra*, note 4.

93 See B. ANDERSON, *supra*, note 88, p. 45.

94 See M. BALS, *supra*, note 14, p. 145.

95 See P.M. DAENZER, *supra*, note 85, p. 81.

96 The ASSOCIATION DES AIDES FAMILIALES DU QUÉBEC has taken the position that the program should be abolished; see *Submission presented to the Minister of Citizenship and Immigration Lucienne Robillard within the framework of the public consultations on the Report entitled: "Not Just Numbers: A Canadian Framework for Future Immigration,"* Montréal, March 7, 1998. The PHILIPPINE WOMEN CENTRE OF BRITISH COLUMBIA is also in favour of its abolition. See *Filipino Nurses Doing Domestic Work in Canada: A Stalled Development, supra*, note 89, p. 46.

First, the LCP's basic objective remains problematic. Since few people in Canada want to perform this type of work because of the difficult conditions associated with it, there has been a shortage of workers in this sector for several decades. More tractable workers are recruited in poorer countries and, in return, given the opportunity to immigrate to Canada. This kind of exchange, akin to exploitation, raises eyebrows. The history of immigrant caregivers in Canada also raises questions. As we described earlier, the legal status of these workers has deteriorated over the decades as the ethnic composition of the new recruits changed.

Moreover, despite the establishment of the LCP, whose only objective is to reduce the shortage of workers in this sector, the shortage still persists. First, we might ask whether there is a genuine shortage.[97] If the working conditions were better, one would think that Canadian women would not reject this kind of occupation and the shortage would be reduced. The LCP would no longer have a *raison d'être*. Second, the LCP is not an adequate solution to Canada's childcare problems[98] since the worker shortage persists. In truth, the LCP masks another problem: the lack of childcare. Canada cannot try to solve this problem by recourse to immigrant workers, a cheap, captive work force. It must propose a national childcare policy.

One might also ask what impact the new $5 per day per child daycare program in Quebec, along with the similar program in British Columbia,[99] is having on the demand for immigrant live-in caregivers. Parents often justify hiring a caregiver, as opposed to daycare, on economic grounds. In Quebec, it costs almost the same to have a caregiver in the home as it costs for daycare for two children. In fact, the weekly salary paid to a live-in caregiver in Quebec is $271 for 49 hours of work, plus the cost of benefits.[100] Before the $5 per day per child daycare program was adopted, it cost on average $125 per week per child in a daycare centre, or $250 per week for two children. It was therefore more advantageous to hire a caregiver to work in the home than to put two children into daycare, particularly if they were very young. Now, however, assuming there are enough $5 spaces in daycare centres, the economic argument is no longer valid. Nonetheless, there may be advantages to having the services of a live-in caregiver compared to daycare at $5 per day per child, especially for families with very young or sick children.[101]

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97 See COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, p. 22.

98 At the beginning of the 1990s, S. ARAT-KOÇ believed there was a crisis in the private sector. She stated that the demand for live-in caregivers would continue to increase because of the lack of quality childcare services, the inflexibility of the labour market and the possibility of hiring a live-in caregiver cheaply. S. ARAT-KOÇ, *supra*, note 1, p. 82.

99 Robert DUTRISAC, "Les garderies à 5$ font des petits. La Colombie-Britannique n'attend pas Ottawa et suit l'exemple du Québec," *Le Devoir*, Montréal, June 8, 2000, p. A-4.

100 Benefits amount to about 10 percent.

101 On the advantages of a live-in caregiver, see M. BALS, *supra*, note 14, p. 42. On the shortage of $5-per-day spaces in daycare centres in Quebec, see the series of three articles by

The working conditions these women experience are not very enviable. They live in physical and social isolation, with little or no privacy, and are often victims of all kinds of abuse.[102] They have had to leave their families for a job that is unrecognized and underpaid. The Association des aides familiales du Québec and the Philippine Women Centre of British Columbia have characterized the working conditions as exploitation and unacceptable subordination.[103] Moreover, the LCP contributes to the devaluation of domestic work and the creation of a job ghetto. One could also conclude that it artificially maintains poor working conditions compared with the rest of the market, and that eliminating the program would allow working conditions to improve.

Furthermore, the LCP contributes to the loss of occupational skills by some women in the program. The number of nurses from the Philippines who come to Canada under the LCP is increasing.[104] Although these women are graduate nurses from recognized universities in the Philippines, have been especially trained to work abroad and have often worked in other countries, their training is not recognized in Canada despite the shortage of workers in that field.[105] Because they cannot immigrate to Canada in the independent class, they use the LCP in the hope of becoming permanent residents and some day practising their profession. Studies have shown that most of them will not work in nursing because of the requirements of the program. To satisfy the LCP requirement for previous experience as caregivers, a good number of them have worked as caregivers in another country before arriving in Canada. During the 24 months of domestic work, which often takes longer to complete, they cannot work part-time as nurses. For quite some time, they will not be able to practise their profession. If they do not work as nurses for five years, some professional bodies require

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Marie-Claude MALBOEUF, *La Presse*, Montréal, February 5, 2000, p. A-3, February 6, 2000, p. A-8, February 7, 2000, p. A-16.

102 A study conducted in Britain by Anti-Slavery International between 1990 and 1992 indicates that 91.9 percent of the immigrant live-in caregivers questioned reported psychological abuse, 95.5 percent had no free time, 81 percent were not paid regularly or as provided for in their contract, 68 percent had been paid less than provided for in the contract, 62.3 percent did not eat regularly, 58.1 percent had had their passports confiscated by their employers, 55.1 percent did not have a bedroom, 55.5 percent did not have a bed, 33.6 percent suffered physical abuse, and 6.3 percent had been sexually assaulted. Considering that immigrant live-in caregivers are not protected by immigration legislation in Britain, the situation there is worse than in Canada. See B. ANDERSON, "Campaign Update," two loose-leaf sheets, table 1, *supra*, note 88.

103 See ASSOCIATION DES AIDES FAMILIALES DU QUÉBEC, *supra*, note 96, p. 2; PHILIPPINE WOMEN CENTRE OF BRITISH COLUMBIA, *Filipino Nurses Doing Domestic Work in Canada: A Stalled Development*, *supra*, note 89.

104 On this subject, see PHILIPPINE WOMEN CENTRE OF BRITISH COLUMBIA, *Filipino Nurses Doing Domestic Work in Canada: A Stalled Development*, *supra*, note 89.

105 See Jean-François BÉGIN, "Recrutement de 95 infirmières en France, leur arriveé ne permettra pas de résoudre le problème de pénurie cet été," *La Presse*, Montréal, June 14, 2000, p. A-1.

that they take refresher courses, which are often very expensive for women with such meagre incomes. It is therefore very difficult for them to escape the cycle of poverty. From a feminist standpoint, the program also raises questions. Bringing underpaid women from disadvantaged countries enables others in industrialized countries to free themselves from household chores, enter the labour market and achieve a certain degree of economic independence. In addition, other women will have to care for the children whom the immigrant caregivers leave behind. The program therefore challenges the ideals of equality of the feminist movement. It also relegates household chores and childcare exclusively to women. Of course, it allows women from the Third World greater mobility but it also reduces it: once in this country, these women must work as live-in caregivers exclusively for the employer whose name appears on their work permits, and they are required to live in the home of that employer.

The Legislative Review Advisory Group (LRAG) on immigration legislation recommended that the LCP be eliminated and that these workers be included in the Foreign Worker Program.[106] The purpose of this special program is to remedy the shortage of workers in specific fields. It includes a special program for information technology workers, the spousal employment authorization pilot project, the seasonal agricultural worker program and the live-in caregiver program. The Advisory Group recommended that a worker with a permanent job offer as a live-in caregiver, who meets the criteria for education, age and knowledge of the official languages, be granted permanent resident status immediately upon arrival in Canada, without being required to live in the home of her employers. On the other hand, the LRAG also reported that some people had argued in favour of abolishing the program on the grounds that it gives these women an unfair advantage since they are permitted to apply for permanent residence without leaving Canada and without meeting skills-based selection criteria, unlike other applicants for permanent residence.[107]

Although this reform would grant immediate permanent residence and eliminate the live-in requirement, critics have pointed to some problems.[108] First, the definition of a permanent job offer is not clear. Is a permanent job necessary at the time the application is filed or throughout the 24-month period? The worker's status would then depend on whether her employers decided to continue the job offer. Second, a worker without a permanent job offer will keep her temporary status, which is a source of abuse. In addition, these workers have

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106 See Immigration Legislative Review report, *Not Just Numbers: A Canadian Framework for Future Immigration*, Ottawa: Department of Public Works and Government Services Canada, 1997, Recommendation No. 75.

107 See *idem*, p. 73.

108 See WEST COAST DOMESTIC WORKERS' ASSOCIATION, *supra*, note 2 ; ASSOCIATION DES AIDES FAMILIALES DU QUÉBEC, *supra*, note 96 ; Sedef ARAT-KOÇ, "NAC's Response to the Immigration Legislative Review report *Not Just Numbers: A Canadian Framework for Future Immigration*," (1999) 19 *Les Cahiers de la femme* 18; GAATW CANADA and PHILIPPINE WOMEN CENTRE, *Echoes: Cries for Freedom, Justice and Equality: Filipino Women Speak*, Vancouver-Victoria, 1999, p. 46.

little chance of meeting the criteria with respect to education,[109] age and knowledge of official languages, given their disadvantaged position in their countries of origin. In our view, the proposed reform does not solve the fundamental problem of access to immigration for women from Third World countries and the trafficking that may result from that problem.

Although the Conseil des relations interculturelles du Québec has not taken a definitive or official position, it does mention the ethical problems raised by the practice of hiring immigrant caregivers. It has emphasized that [TRANSLATION] "one of the effects of this program has been to facilitate immigration by people who would not have been selected otherwise, and who, in large measure, have joined the ranks of the disadvantaged in our society."[110]

However, the removal of the LCP will not improve the chances of women from disadvantaged countries who are trying to immigrate to Canada. At present, a caregiver cannot accumulate enough points under the selection criteria to qualify as an independent immigrant[111] because the occupation of caregiver is not on the General Occupations List.[112] The allocation of points under the selection criteria for immigrants would have to be modified to recognize, on the one hand, the social and economic value of both domestic work and caring for children, the elderly or the disabled, and the experience of these workers on the other. Just as changes are required to retain the program, its abolition would also require changes.

2.2.4 Our Position

We have set out the arguments for retaining and for abolishing the LCP. The dilemma is profound,[113] the choice not easy. Even immigrant caregiver rights groups are not in agreement

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109 On the other hand, according to its surveys, the WEST COAST DOMESTIC WORKERS' ASSOCIATION states that its members, especially those from the Philippines, are highly educated. See *supra*, note 2, p. 8. See, to the same effect, GAATW CANADA and PHILIPPINE WOMEN CENTRE, *Echoes: Cries for Freedom, Justice and Equality: Filipino Women Speak*, *idem*, p. 28.

110 See the letter sent by Arlindo VIEIRA, president of the Conseil des relations interculturelles, in 1996 for the preparation of the *Rapport du Comité interministériel d'étude des conditions de travail des aides familiales*, *supra*, note 6.

111 See A. MACKLIN, *supra*, note 37, p. 743.

112 This is a list of trades and occupations for which there exists a demand in Canada and which can absorb immigrants arriving in Canada. See http://www.cic.gc.ca (accessed on May 9, 2000).

113 In its report, the WEST COAST DOMESTIC WORKERS' ASSOCIATION clearly illustrates the dilemma of whether to retain or eliminate the program: "On the one hand, the legislation is so designed that it ensures that these women caregivers enter Canada alone in a kind of bonded servitude that can lead to exploitation. On the other hand, women who would not qualify otherwise are permitted to come as independent individuals from other countries, often poor countries, to work and experience life in Canada." See *supra*, note 2, p. 16.

on this issue.[114] Because the benefits of abolishing the LCP outweigh those of retaining it, we recommend that it be abolished.

In the first place, the LCP's objectives are more than questionable and raise ethical concerns. The program is intended to fill the need for domestic workers because Canadian women refuse to work in this area due to the difficult working conditions. Even if all the desired improvements were made, the LCP would force women to work in a single sector of the work force for a certain period of time, thereby restricting their freedom and violating their right to equality. Obviously, it could always be argued that, in any event, they would have worked under difficult conditions in their countries of origin or elsewhere, and that the majority of these women are very happy that the LCP exists. However, their situation must be assessed taking into account the standards in force in Canada.

Furthermore, given the small number of people accepted into the LCP, the benefit of retaining it, namely, the opportunity for these women to immigrate to Canada, does not outweigh the drawbacks. It is true that eliminating the LCP will not really resolve the situation of these women and its disappearance could generate clandestine immigration.[115] Economic conditions in the poorer countries will not improve. They need the foreign currency sent by these women to their families, and migration is a solution to their unemployment problem. The globalization of economies has not slowed the migration of these workers.[116] Women will still want to immigrate in order to provide the financial support needed by their families. In fact, women must avail themselves of this program because it is difficult for them to immigrate to Canada otherwise. The solution does not lie in improvements to the program, however good the improvements may be. Instead, the selection criteria must be revised because they discriminate against certain classes of women.[117] If there is a shortage of such workers in Canada, why is the true value of the work of the caregiver not recognized in the immigration criteria?

The abolition of the LCP raises the problem of the status of the women already in the program. We recommend that they be granted permanent residence as soon as the program is eliminated.

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114 See *supra*, notes 87 and 96.

115 In 1981, a task force established to review immigration policies and procedures rejected the idea of doing away with a special program for immigrant caregivers. As Canadian women would not have chosen to do this work despite the demand, illegal immigrants would likely have taken these jobs, which could have led to further abuse. "Domestic Workers on Employment Authorizations: A Report on the Task Force on Immigration Practices and Procedures," cited in P.M. DAENZER, *supra*, note 85, p. 81.

116 See L.L. LIM, *supra*, note 84.

117 This was the position taken by the NATIONAL ASSOCIATION OF WOMEN AND THE LAW, representing seven women's groups. However, while waiting for the point system to be revised, these women's groups wanted the LCP to be retained, because it is the only way for these workers to enter Canada. See Ad Hoc Committee on Gender Analysis of Immigration and Refugee Protection Legislation and Policy, Submission to Citizenship and Immigration Canada, Ottawa: National Association of Women and the Law, March 1999, p. 11.

For these reasons we are in favour of abolishing the LCP. However, from a strategic standpoint, as it may be difficult to modify the selection criteria in the short term, we are prepared to support retaining the LCP in an improved form, designed to respect the fundamental rights of the women involved. This approach would give women from the Third World the opportunity to immigrate to Canada and would at least assist the few thousand women whose lives are governed by the program. It is in this context that we propose improvements to the existing LCP.

RECOMMENDATION

1. **We recommend that the federal government revise the selection criteria for the independent immigrant class to recognize the need for live-in caregivers in Canada.**

2.3 Proposals for Improving the LCP

Far from novel, the following proposals have been put forward for years by advocacy groups in this area.[118] They relate to temporary status (2.3.1), the 24-month work period (2.3.2), the obligation to live in the home of the employers (2.3.3), recruiting agencies (2.3.4), financial assistance to live-in immigrant caregivers rights groups (2.3.5), and information for dissemination to immigrant live-in caregivers (2.3.6). The purpose of the measures is to ensure that the LCP respects the fundamental rights of the participants.

2.3.1 Temporary Status

These women must be granted permanent residence upon arrival, if that is their choice. They will then be able to choose their own employers, and change employers when they consider the employer-employee relationship too difficult, or for any other reason, with penalty, like all other workers. In addition, they will not have to pay renewal fees, a significant expense in view of their low income. Granting immediate permanent residence would not be new since from 1950 to 1973 permanent residence was given to caregivers from the Caribbean.[119]

Another solution to this problem suggested by one expert is to issue live-in caregivers an open work permit, i.e., without the name of an employer, valid for two years, which would

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118 See, *inter alia*, the following reports: Sedef ARAT KOÇ and Fely VILLASIN, *supra*, note 87; WEST COAST DOMESTIC WORKERS' ASSOCIATION, *supra*, note 2; ASSOCIATION DES AIDES FAMILIALES DU QUÉBEC, *supra*, note 96; GAATW CANADA and PHILIPPINE WOMEN CENTRE, *supra*, note 108, p. 46.

119 See S. ARAT-KOÇ, *supra*, note 37, p. 53. In 1990, in its recommendations for modifying the LCP, Intercede recommended, *inter alia*, that women in the program be granted permanent resident status. See S. ARAT-KOÇ and F. VILLASIN, *supra*, note 87. See also the letter from the Chair of Intercede's Board of Directors to Lucienne Robillard, then Minister of Immigration, *Domestics' Cross-cultural News*, Intercede, September 1999, which takes that position.

enable them to choose their employers without having to pay renewal fees.[120] Both solutions produce the same result, i.e., giving the worker greater autonomy and preventing abusive situations. However, from a psychological standpoint permanent residence seems preferable to us: the worker would have permanent residence, not just a temporary work permit.

RECOMMENDATION

2. We recommend that the federal government grant immediate permanent residence to people coming to Canada under the LCP.

2.3.2 The 24-Month Work Period

In the event that the program, as well as its objectives, is retained, we recommend reducing the mandatory work period. Taking into account the fact that these women are separated from their families and living in a situation of dependence, the 24-month period of domestic work, plus the 12 to 18 months' waiting period after the filing of the application for permanent residence, seems too long to us. It may be justified from the point of view of the employers. They have to pay the fees of the recruiting agency in some cases, wait at least a year before obtaining the services of a caregiver, and usually require her services for more than a year. If the worker feels she is treated fairly, she will want to stay longer anyway. In 1955, the program for live-in caregivers from the Caribbean granted immediate permanent residence and required domestic work for one year. Therefore we recommend that this period be reduced from 24 to 12 months[121] and that the worker be allowed to complete it within 24 months instead of three years.

RECOMMENDATION

3. We recommend that the federal government reduce the period of domestic work from 24 months to 12 months and that the worker be allowed to complete it within 24 months.

2.3.3 The Obligation to Live in the Employers' Home

All caregivers rights groups have recommended the elimination of the requirement of living in the home of the employer,[122] and we are doing the same. However, in certain cases, the employers would have to provide accommodation. For example, when the job involves caring for a sick person and the caregiver must be available, she should be able to live in the employers' home, but her salary should reflect her hours of availability. In some instances a

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120 See M. BALS, *supra*, note 14, p. 185.

121 See the recommendation of the WEST COAST DOMESTIC WORKERS' ASSOCIATION, *supra*, note 2, p. 17.

122 In 1990, among its recommendations for changing the federal program, Intercede proposed that the obligation to live in the home of the employer be eliminated. See S. ARAT-KOÇ and F. VILLASIN *supra*, note 87. See also, to the same effect, A. BLACKETT, *supra*, note 45. This recommendation has also been made in other countries; see M. WIJERS and L. LAP-CHEW, *supra*, note 88, p. 68 ff.

dim view might be taken in her home country of a young woman living alone. It may also be difficult to find accommodation in a foreign country, and the opportunity of living in the home of the employer may help a newcomer to adjust. It is also possible that the salary paid is not adequate to cover the cost of decent housing. When the worker asks to live in the employer's home, or the nature of the work requires it, certain standards should be provided by regulation to ensure respect for her privacy, such as a room of her own with a lock, a key to the house,[123] remuneration for hours of availability, and free room and board.

RECOMMENDATION

4. **We recommend that the federal government eliminate the obligation to live in the home of the employers, unless the nature of the work so requires or the caregiver so requests.**

2.3.4 Recruiting Agencies

In Asia it is now recognized that the "immigration industry" (i.e., the agencies) have greatly contributed to the increased migration of women, both legal and illegal. Government or private agencies provide information to the workers involved, conduct recruitment and prepare the workers to meet the requirements of the employer countries. It remains to be determined whether these intermediaries really help the women to immigrate, or instead generate more obstacles and costs.[124]

Recruiting agencies operating in Canada should be subject to controls to prevent unfair practices in their dealings with immigrant caregivers.[125] In this area, given the position of inferiority of the women concerned, the abuses can be very serious.[126] According to Intercede (the Organization for Domestic Workers' Rights in Toronto), one Canadian employment agency, which recruits workers in the Philippines, charges $300 per worker for non-existent jobs and asks the worker for the names of 20 women interested in working as caregivers in Canada.[127] For its part, the Association des aides familiales du Québec reports that employment agencies may ask for as much as $1,000 to $5,000 to obtain a work permit. Some agencies have forced immigrant workers to use their services to find a new employer. The workers are not informed by these agencies of their rights, and are told that they must

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123 See clause 9 of the live-in caregiver work contract, *supra*, note 7.

124 See L.L. LIM, *supra*, note 83, p. 11.

125 On the stereotyped and racist practices of placement agencies in Canada, see A.B. BAKAN and D.K. STASIULIS, *supra*, note 43.

126 On abuses by these agencies see L.L. LIM, *supra*, note 83, p 11.

127 On the subject of abuses in Canada, see "Illegal Recruiter Pyramid Scam," *Domestics' Cross-cultural News*, Toronto: Intercede, September 1999.

agree to work overtime without pay.[128] In Great Britain, one study mentions that employment agencies charge exorbitant fees to the women using their services.[129] Once the women arrive in the host country, they must often continue to work in difficult situations in order to repay the money they borrowed from these agencies.

Because this topic involves contractual relationships between the agency, the worker and the future employers, legislative competence falls to the provinces. Regulations should require the agencies to obtain licences on condition that their past conduct affords reasonable grounds for belief that they will carry on their business in accordance with the law and with honesty and integrity.[130] Agencies should also be required to furnish security to guarantee the good conduct of their staff, control the fees they charge to applicants, and keep files containing information about the applicants, the would-be employers, fees charged to applicants and job placements made. Loans to workers by the agencies should be prohibited. The agencies should also be obligated to provide future employers and workers with accurate information. All these obligations should be accompanied by fines and penalties for non-compliance.

Ontario[131] and British Columbia[132] have already enacted such legislation. In Ontario, the amount of the security to be furnished varies depending on the services offered by the agency. If the agency handles all kinds of placements, the bond is $1,000 and annual fees are $500; if it places only sitters and homemakers, the bond is $100 and annual fees are $100. The agency may not charge sitters and homemakers more than 10 percent of the salary earned by a worker thus placed, for a maximum of four months. For example, if the sitter earns $301.40 per week (minimum wage for a 44-hour week in Ontario, amounting to $1,205.60 per month), the agency may deduct no more than $482.24 (10 percent of four months' salary).

RECOMMENDATION

5. We recommend that provincial governments regulate the operation of recruiting agencies.

2.3.5 Maintaining Financial Assistance for Immigrant Caregiver Rights Groups

Financial assistance for immigrant caregiver rights groups should be maintained and increased. These community groups play several very important roles.[133]

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128 See ASSOCIATION DES AIDES FAMILIALES DU QUÉBEC, *supra*, note 96, p. 4.

129 See M. WIJERS and L. LAP-CHEW, *supra*, note 88, p. 78 ff.; B. ANDERSON, *supra*, note 88, p. 36 ff.

130 See s. 6, *Employment Agencies Act*, R.S.O. 1990, c. E.13.

131 See *Employment Agencies Act, idem; Employment Agencies Act General*, R.R.O. 1990, Reg. 320.

132 See s. 12, *Employment Standards Act*, *supra*, note 60; ss. 2, 3, 4, *Employment Standards Regulation*, B.C. Reg. 396/95.

133 See the testimony of caregivers on the role of these community groups: Miriam ELVIR, an immigrant live-in caregiver who worked for the Association pour la défense des droits du

First, they provide information to live-in immigrant caregivers. These women often mistrust government officials and agencies due to experiences in their home countries, and they do not always understand the administrative details of their situation and live in isolation. Consequently, rights groups play a crucial role as information providers[134] and rights protectors, since they are in a better position to contact the caregivers and understand them. In addition to information, they provide education. They offer language courses, courses on how to prepare a résumé, job search seminars, placement services and legal clinics. Their role in helping the workers integrate into Canadian society should also be mentioned. They organize cultural activities and social events. Unlike migrant workers who work in groups in fields or on construction sites, caregivers live in isolated circumstances, with no opportunity for establishing a network of friends, and the rights group is often their only outside contact. These organizations also ensure representation for caregivers in bringing their demands to the attention of political decision makers. They play a role in disseminating information and raising public awareness about the value of domestic work and the demands being made by caregivers.[135] Often led by women who themselves have worked as caregivers, these groups encourage caregivers to take responsibility for themselves: their situation will improve if they take control of their lives. Most of the time their services are designed and delivered by caregivers.

These advocacy groups provide an important service to live-in immigrant caregivers[136] and they should not have to operate in a state of constant uncertainty over their financial future. In order for them to continue their ongoing work, their funding should be maintained and increased. To that end, the following organizations could increase funding to these community groups: the Secrétariat à l'action communautaire autonome du Québec, the Quebec Ministère des Relations avec les citoyens et de l'Immigration, Status of Women Canada and the Department of Citizenship and Immigration Canada.

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personnel domestique de Montréal, *supra*, note 65, p. 147; Pura M. VELASCO, an immigrant live-in caregiver who worked at Intercede in Toronto; "We Can Still Fight Back: Organizing Domestic Workers in Toronto," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 157.

134 See, for example, the brochure *Métier : aide familiale, petit guide pour connaître ses droits*, published in 1998 by the Association des aides familiales du Québec, and that group's newsletter, *La tête haute*, published every two months.

135 See "La journée des aides familiales," an advertisement published in *Le Devoir*, Montréal, April 26, 2000, p. A-4, by the Association des aides familiales du Québec to spotlight the Journée des aides familiales [caregivers' day].

136 The important role played by these associations was recognized by the awarding of the Prix Claire-Bonenfant for democratic values by the Ministère des Relations avec les citoyens et de l'Immigration du Québec to the Association des aides familiales du Québec in 1998. The jury underlined the quality of the Association's work with caregivers, its spirit of inclusiveness and the encouragement of personal responsibility characteristic of its modus operandi.

RECOMMENDATION

6. We recommend that the federal and provincial governments maintain and increase funding to immigrant caregiver rights groups.

2.3.6 Information Provided to Immigrant Live-in Caregivers

Obtaining accurate information about the eligibility requirements for the program or about labour legislation is a problem for immigrant live-in caregivers. To ascertain the quality of the information they are given, we examined the documents produced for them by the federal[137] and Quebec[138] governments. Despite the complexity of the subject matter, efforts have been undertaken to make these materials attractive, easy to read, clear and informative. The materials published by the federal government are not as clear as those of Quebec because they do not give all the necessary information about matters under provincial jurisdiction, and very often they refer the reader to Quebec documents or provincial legislation. The workers, therefore, have to obtain information from both levels of government, a potential source of confusion.[139] As for the Quebec materials, two different documents must be consulted: one regarding the eligibility requirements for immigrant live-in caregivers working in Quebec, and another dealing with employment standards. While the first refers to the second, it would be preferable, for the sake of convenience, for the two documents to be combined into one, particularly since they both deal with matters under provincial jurisdiction.

Because labour legislation varies from province to province, a single brochure should be designed for each province to include all the necessary information about both immigration and labour legislation. It cannot be assumed that the women who are the subject of this study can distinguish between matters of provincial and federal jurisdiction. The brochures should be written in the mother tongues of the workers. Although they are required to understand and speak English or French, such a measure would enable them to have a good understanding of the information provided. Furthermore, in order to ensure that these workers actually receive the information, arrangements should be made for live-in caregiver rights groups to be informed of the arrival of a worker in Canada, and for them to be able to contact her.

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137 See the brochure of CITIZENSHIP AND IMMIGRATION CANADA, *supra*, note 19. That information is also found on the Web site of the Department of Citizenship and Immigration Canada. See http://www.cic.gc.ca (accessed on May 9, 2000).

138 See the documents in the kit entitled *Vivre au Québec* [Living in Quebec], produced by the Ministère des Relations avec les citoyens et de l'Immigration du Québec, which includes the standard live-in caregiver work contract; the Guide à l'intention des aides familiales résidantes, Government of Quebec, Ministère des Relations avec les citoyens et de l'Immigration, March 1999; Commission des normes du travail, *Les normes du travail au Québec et les domestiques résidents*, Government of Quebec, January 1999; as well as the various forms. No information regarding immigrant live-in caregivers was found on the Web site of the Ministère des Relations avec les citoyens et de l'Immigration, http://www.immq.gouv.ca (accessed on May 9, 2000).

139 See M. BALS, *supra*, note 14, p. 88, regarding the confusion created for immigrant caregivers by the two levels of government.

RECOMMENDATIONS

7. **We recommend that the federal and provincial governments design an information brochure for each province, for distribution to immigrant live-in caregivers, containing all the information pertaining to both immigration and working conditions.**

8. **We recommend that the federal government inform live-in caregiver rights groups of the arrival of these workers in Canada so that they can establish contact.**

2.3.7 Other Measures

In addition to the recommendations for amending the admission criteria for an independent immigrant and improving the LCP, other measures to assist these workers seem promising to us. For example, the salary and benefits paid to a live-in caregiver by parent-employers could be completely deductible from the parent-employers' income. At present, parents in Quebec can deduct a maximum of $7,000 per child from their income, taking both federal and provincial refunds into account, which does not cover the cost of hiring a live-in caregiver.[140] We should note that a business may deduct the full cost of its employees from its income.[141] Financial assistance could also be given to parents who pay for babysitting in their home.[142] Although statistics indicate that most families who use this kind of service are comfortably off, other less well-to-do families might also need live-in caregivers, especially in the context of government cutbacks to health care. These two measures would enable parents to pay live-in caregivers a higher salary. Moreover, an analysis of the situation of immigrant live-in caregivers cannot pass over in silence the absence of a national childcare program. As we noted earlier, the LCP has not succeeded in remedying the shortage of domestic workers. Canada cannot use this underpaid and docile work force to solve the problem. A flexible, high-quality national childcare system could respond, in part, to the needs of parents.

RECOMMENDATIONS

9. **We recommend that the federal and provincial governments give financial assistance to parents who employ a caregiver in their home.**

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140 See Maurice DRAPEAU, *Conformité avec la Charte des droits et libertés de la personne du projet de loi : Loi modifiant la Loi sur les normes du travail*, Commission des droits de la personne du Québec [Quebec Human Rights Commission], November 2, 1990, p. 2 ff.

141 See *Symes* v. *Canada*, [1993] 4 S.C.R. 695, in which the Supreme Court held that the inability to deduct the costs of a caregiver from business income did not constitute discrimination on the basis of sex.

142 As recommended by the Conseil de la famille. See CONSEIL DE LA FAMILLE, *Avis : la garde des enfants au domicile des parents : choix ou nécessité ? L'impact sur les familles de la protection des gardiennes par la Loi sur les normes du travail*, Government of Quebec, 1993.

10. We recommend that the federal and provincial governments give individuals who hire live-in caregivers tax deductions equal to the actual cost of the salary paid.

11. We recommend that the federal government establish a national childcare program.

2.4 Usefulness of an Action for Infringement of the Right to Equality

All foreign workers with a valid work permit in Canada, as well as permanent residents and Canadian citizens, are protected by the *Canadian Charter of Rights and Freedoms*[143] and provincial legislation, such as Quebec's *Charter of human rights and freedoms*.[144] Live-in immigrant caregivers thus enjoy the right to equality provided for in section 15 of the Canadian Charter[145] and section 10 of the Quebec Charter.[146]

As our recommendations for improving the LCP demonstrate, numerous aspects, if not the entire program, discriminate against immigrant live-in caregivers. Proof that these workers are victims of discrimination is not hard to find. Live-in immigrant caregivers, a large majority of whom are women,[147] are treated differently from other Canadian workers by the *Immigration Regulations*.[148] First of all, they are obligated to live in the home of their employers for a period of 24 months. Next, they are required to work for the employers whose names appear on their work permits. Last, they are not permitted to work in any other field before their application for permanent residence has been approved. This description of the differences in treatment does not take into account the equally discriminatory distinctions that exist in labour legislation, which will be addressed later. In comparison with other workers or other

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143 Part I of the *Constitution Act, 1982*, Appendix B to the *Canada Act, 1982*, U.K., c.11 (hereinafter the Canadian Charter). On the application of the Canadian Charter to all persons physically present in Canada, see *Singh* v. *Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177; D. GALLOWAY, *supra*, note 20, p. 47 ff.

144 R.S.Q., c. C-12 (hereinafter the Quebec Charter).

145 Section 15, Canadian Charter: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

146 Section 10, Quebec Charter: "Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, or age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

"Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right."

147 *Supra*, note 8.

148 *Supra*, note 21.

immigrants, these differences in treatment place a heavier burden on these immigrant women, who belong to a group that has been historically disadvantaged in Canadian society,[149] and the distinctions devalue their work and violate their human dignity. The application of the provisions of the regulations results in the discriminatory treatment of these women based on their sex, race, and national or ethnic origin, and violates section 15 of the Canadian Charter of Rights.[150] Furthermore, we do not believe that the government could justify the LCP under section 1 of the Canadian Charter,[151] which may, in certain cases, authorize limitations on rights and freedoms.

That the constitutionality of the LCP has not been challenged earlier under section 15 of the Canadian Charter and section 10 of the Quebec Charter certainly attests to the fact that these women are reluctant, rightly or wrongly, to use the courts to assert their claims.[152] There are several arguments against legal action, not because of the lack of legal merit but rather for practical reasons.[153] First, besides the not insignificant issue of the financial cost of a court action,[154] it would be necessary to find an immigrant woman currently employed under the LCP as a live-in caregiver and wanting to make a claim. If she agreed to be the plaintiff, she

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149 See the opinion of Madam Justice L'HEUREUX-DUBÉ in *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 563, where she acknowledges that "a significant majority of domestic workers are immigrant women, a subgroup that has historically been both exploited and marginalized in our society."

150 See the position taken by Michèle RIVET, who thinks that domestic workers, like farm workers and workers without authorizations, are subject to distinctions that could violate the Canadian Charter, "Le travailleur étranger au Canada : à l'avant-poste de la précarité," (1998) 43 *McGill L.J.* 181, pp. 204 and 209. See also the three-stage analysis regarding the interpretation of s. 15(1) of the Canadian Charter, in the case *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497; Sarah LUGTIG and Gillian CALDER, "Advancing Women's Equality Through Law: Section 15 Analysis at the Turn of the Century," National Forum on Equality Rights, West Coast LEAF, Vancouver, November 1999.

151 Section 1, Canadian Charter: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." See, on the interpretation of that section, *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

152 On this subject, see, *inter alia*, Lise GOTELL, "Litigating Feminist Truth: An Antifoundational Critique," (1995) 4 *Social and Legal Studies* 99.

153 These authors doubt the utility of such recourse in the case of the LCP: Daiva STASIULIS, "Negotiating the Citizenship Divide: Legal Strategies for Foreign Domestic Workers," National Forum on Equality Rights, West Coast LEAF, Vancouver, November 1999; A. MACKLIN, *supra*, note 37.

154 It is possible to obtain funding under the federal government's Court Challenges Program of Canada. See its Web site: http://www.ccppcj.ca (accessed on May 18, 2000).

would nonetheless have to continue working and living in her employers' home during the litigation, or risk being deported. This could prove to be very difficult for both the employers and the caregiver. She could also face being ostracized by members of her community or other caregivers. Although these women are aware that their working conditions are less than desirable, a majority of them want to complete the 24-month work period so that they can apply for permanent residence and then bring their families to Canada. They know that it would have been difficult for them to immigrate to Canada otherwise. Also, the 24-month work period seems very short in comparison with delays in the legal system. It may therefore be difficult to find a plaintiff. The problem could be circumvented if the immigrant live-in caregiver rights groups initiated the action. To obtain standing, they would have to demonstrate that the validity of the program itself is at issue, that they have a genuine interest in raising the issue because of their work in this area, and that there is no other reasonable and effective way to bring the issue before the courts.[155] Then, even if a complainant were found, or an association initiated proceedings, and a court declared the federal program discriminatory,[156] what would happen to the caregivers currently employed under the program? Would they be automatically sent home because their work permits were no longer valid? In addition, there are limits on the decision-making power of the courts: they can only strike down the program, they cannot rewrite it. Finally, since few women are currently being accepted into the LCP, it seems to us that, when all is said and done, the women personally and collectively involved would reap little benefit from all the energy invested in such proceedings.

On the other hand, we are not unaware of the possible advantages of this kind of action. In the first place, if favourable, the judgment would have a beneficial effect on these workers, since the court would be publicly recognizing that the program violated the fundamental rights of the plaintiffs.[157] Second, if all minority groups refused to use the courts to argue their cases, who would use the charters of rights and freedoms?[158]

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155 See *Canadian Council of Churches* v. *Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236; Peter W. HOGG, *Constitutional Law in Canada*, loose-leaf edition, Vol. 2, Toronto: Carswell, pp. 56-8, 56-9; D. GALLOWAY, *supra*, note 20, p. 51 ff.

156 We think the entire program would be declared discriminatory. It is highly unlikely that only certain provisions of the *Immigration Regulations, 1978*, *supra*, note 21 concerning the program would be declared unconstitutional. For example, by doing away with the live-in requirement, the program would lose its *raison d'être*, since it would be unable to fill the shortage of live-in caregivers.

157 On the therapeutic benefits of a judgment, see, *inter alia*, Nathalie DES ROSIERS, Bruce FELDTHUSEN and Oleana A.R. HANKIVSKY, "Legal Compensation for Sexual Violence: Therapeutic Consequences and the Consequences for the Judicial System," (1998) 4 *Psychology, Public Policy and Law* 433.

158 For an example of the successful use of the Canadian Charter in immigration cases, see *Baker* v. *Canada (Department of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, in which the Supreme Court of Canada set aside the deportation order against Ms. Baker, who had arrived in Canada in 1981 with a visitor visa which she did not renew. For 11 years, she worked illegally as a domestic in the Toronto area. She had four children in Jamaica, her home country, and then had four more in Canada. The Supreme Court held that the interests of the

After weighing the pros and cons of bringing such an action, we do not recommend that it be initiated.

However, immigrant caregiver rights groups could challenge the discrimination inherent in the selection criteria for the independent immigrant class, which place women from the less developed countries at a disadvantage.[159] Although the point system is based on criteria that at first glance appear neutral and of universal application, they favour people who have access to education and have worked at occupations recognized in Canada. Due to systemic discrimination, women from less developed countries do not always have access to education and cannot work in recognized occupations. As a consequence, they cannot accumulate enough points to be admitted in the independent immigrant class. That is why many women immigrate to Canada under the family class, as "dependants" of their husbands. Several studies have shown how applying "dependant" status to immigrant women from poor countries does not always reflect reality because, far from being economically dependent on their husbands, they must often work outside the home to support their families. That status may also perpetuate a relationship in which they are subordinate to the husband, and may lead to spousal violence. In sum, the Canadian immigration system, based on the ability of immigrants to be economically independent, has negative effects on the admission of women from disadvantaged countries.[160]

Recommendations Concerning the Live-in Caregiver Program

1. We recommend that the federal government revise the selection criteria for the independent immigrant class to recognize the need for live-in caregivers in Canada.

2. We recommend that the federal government grant immediate permanent residence to people coming to Canada under the LCP.

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children born in Canada had to be taken into consideration on humanitarian and compassionate grounds.

159 Since women denied visas by Canadian officials are not physically present in Canada, they are not protected by the Canadian Charter.

160 Several authors have denounced the discriminatory nature of immigration policies. See, *inter alia*, Roxanna NG, "Racism, Sexism, and Immigrant Women," in Sandra BRUT, Lorrain CODE and Lindsay DORNEY, eds., *Changing Patterns: Women in Canada*, 2nd ed., Toronto: McClelland and Stewart Inc., 1993, p. 279; J. HYNDMAN, *supra*, note 87; Sunera THOBANI, "Sponsoring Immigrant Women's Inequalities," (1999) 19 *Les Cahiers de la Femme* 11; Yasmeen ABU-LABAN, "Keeping 'em Out: Gender, Race, and Class Biases in Canadian Immigration Policy," in Veronica STRONG-BOAG *et al.*, eds., *Painting the Maple: Essays on Race, Gender and the Construction of Canada*, Vancouver, UBC Press, 1998, p. 69; Monica BOYD, "Immigrant Women in Canada," in Rita JAMES SIMON and Caroline B. BRETTEL, eds., *International Migration: The Female Experience*, Toronto: Rowman & Allenheld, 1986, p. 45.

3. We recommend that the federal government reduce the period of domestic work from 24 months to 12 months and that the worker be allowed to complete it within 24 months.

4. We recommend that the federal government eliminate the obligation to live in the home of the employers, unless the nature of the work so requires or the caregiver so requests.

5. We recommend that the provincial governments regulate the operation of recruiting agencies.

6. We recommend that the federal and provincial governments maintain and increase funding to immigrant caregiver rights groups.

7. We recommend that the federal and provincial governments design an information brochure for each province, for distribution to immigrant live-in caregivers, containing all the relevant information pertaining to both immigration and working conditions.

8. We recommend that the federal government inform live-in caregiver rights groups of the arrival of these workers in Canada so that they can establish contact.

9. We recommend that the federal and provincial governments give financial assistance to parents who employ a caregiver in their home.

10. We recommend that the federal and provincial governments give individuals who hire live-in caregivers tax deductions equal to the actual cost of the salary paid.

11. We recommend that the federal government establish a national childcare program.

PART II ANALYSIS OF LABOUR LEGISLATION AFFECTING IMMIGRANT LIVE-IN CAREGIVERS

As we noted earlier, we cannot discuss the status of the immigrant live-in caregiver without a look at the legislation affecting her working conditions, which falls under provincial jurisdiction. Within this framework, we shall analyse in greater detail the relevant Quebec statutes, and compare specific aspects with the statutes of certain other provinces. Our objective is not to describe all the minimum standards applying to these workers, but to highlight the unfavourable treatment reserved for them. In fact, an immigrant live-in caregiver is not subject to the same labour standards and protections as the majority of workers. The analysis is followed by recommendations.

Before undertaking an examination of the working conditions of an immigrant live-in caregiver, some explanation is in order.

First, if the LCP were eliminated, or if certain changes to it were made, many instances of unequal treatment and discrepancies in the legislation affecting the working conditions of immigrant live-in caregivers would disappear, or employers would comply more often with minimum labour standards. The living conditions of the immigrant live-in caregiver would improve. For example, if the obligation to live in the home of the employers imposed by the LCP were removed, caregivers would be much less vulnerable and in a better position to exercise their rights because they would be much less afraid of bringing a complaint against their employers to Quebec's Commission des normes du travail (CNT) [labour standards board].

Second, the working conditions of an immigrant live-in caregiver depend largely on the concept of work prevalent in society. As long as work is considered an activity carried on outside the home, as long as domestic work is considered natural to women and therefore to be performed without remuneration, as long as we consider domestic work neither dangerous nor productive, then caregivers, whether live-in or not or whether immigrants or not, will not be treated like all other workers. Therefore society's perception of domestic work must be altered. A change in minimum labour standards, together with other measures, could be one way of achieving this objective.

The following comments apply to "legal" immigrant live-in caregivers, i.e., those who have complied with the eligibility requirements of the LCP and have valid work permits. An "illegal" caregiver without a valid work permit does not enjoy the protection afforded by labour legislation. Section 18(1) of the *Immigration Regulations, 1978*[161] provides that no person, other than a Canadian citizen or permanent resident, may work in Canada without an employment authorization. The *Immigration Act*[162] and the *Immigration Regulations, 1978*[163]

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161 *Supra*, note 21.

162 *Supra*, note 21.

163 *Supra*, note 21.

are "public order" legislation. Pursuant to article 1413 of the *Civil Code of Québec*, when the object of a contract (for example, a work contract between an immigrant worker with no work permit and an employer) is contrary to public order — in this case, does not comply with the *Immigration Regulations, 1978*[164] — the contract is null. It is therefore deemed not to have been formed and may not be implemented. Accordingly, the courts have held that an employment contract entered into in violation of section 18(1) of the *Immigration Regulations, 197*[165] is invalid and results in loss of benefit of labour legislation by an immigrant worker without a work permit.[166] For example, an immigrant worker without a work permit who suffers an industrial accident cannot receive compensation under the *Act respecting industrial accidents and occupational diseases* (*I.A.O.D.A.*).[167] An employer who hires an immigrant worker without a work permit, knowing that the worker is not authorized under the *Immigration Act*[168] to work, is liable to a fine not exceeding $5,000 and to imprisonment for a term not exceeding two years.[169]

There are also numerous disparities among provincial statutes with regard to the minimum labour standards applying to live-in caregivers. We mention here only those which are relevant. As a general rule, the live-in caregiver should be treated like all other workers. For example, she must enjoy at least the same basic working conditions, including the same minimum wage and the same regular workweek. She should also be compensated in the event of a work accident. Status of Women Canada should therefore make efforts to convince the provinces of the need for identical treatment of all workers.

A live-in caregiver's working conditions are governed by three main statutes, namely, the *Act respecting Labour Standards* (*L.S.A.*)[170] (1), the *Act respecting industrial accidents and occupational diseases* (*I.A.O.D.A.*)[171] (2) and the *Act respecting occupational health and safety* (*O.H.S.A.*)[172] (3). We shall now examine these acts. We shall then discuss legal action for violation of the right to equality (4), and unionization of these workers (5).

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164 *Supra*, note 21.

165 *Supra*, note 21.

166 See *Saravia* v. *101482 Canada Inc.*, [1987] R.J.Q. 2658 (C.P.); *Lauret Verger Jean-Marie Tardif inc.*, [1992] C.A.L.P. 510; *Allendes* v. *Canada (Minister of National Revenue—M.N.R.)*, [1995] T.C.J. No. 161 (T.C.C.) (Q.L.).

167 R.S.Q., c. A-3.001; see *Boulaajoul et ferme M.S. Nadon enr.*, [1994] C.A.L.P. 1540.

168 *Supra*, note 12.

169 See s. 96 (1), *Immigration Act*, *supra*, note 21.

170 R.S.Q., c. N-1.1.

171 *Supra*, note 167.

172 R.S.Q., c. S-2.1.

Before analysing these statutes and proposing amendments, we recommend that Canada take a clear position, at the international level, in support of protecting all these workers, whether they be Canadian citizens or migrant workers. For example, Canada should ratify the 1949 *Migration for Employment Convention (Revised), 1949* (C97) and the *Migrant Workers (Supplementary Provisions) Convention, 1975* (C143). The purpose of those two conventions is to guarantee migrant workers, including immigrant live-in caregivers while they have only temporary status, treatment identical to the treatment of nationals of the countries where the migrant workers find themselves. Basically, this means providing them with working and living conditions that are not discriminatory.

RECOMMENDATION

12. We recommend that Canada ratify the *Migration for Employment Convention (Revised), 1949* (C97) and the *Migrant Workers (Supplementary Provisions) Convention, 1975* (C143).

1 The *Act respecting labour standards*

The *Act respecting labour standards*[173] applies, with certain exceptions, to an immigrant live-in caregiver. We shall analyse the effects of these exceptions, namely, with regard to the minimum wage and the standard workweek (1.1). We shall also examine the definition of "hour worked" (1.2), the creation of a registry of employers (1.3), the "employment-service cheque" *[chèque emploi-service]* (1.4) and measures to enforce compliance with the law (1.5).

Because our subject is the treatment of immigrant live-in caregivers, we do not address the question of sitters [*gardiennes*], although a number of problems arise in relation to their legal status. A sitter, that is, a person "whose *exclusive* duty, in a dwelling, is to take care of or provide care to a child or to a sick, handicapped or aged person," is excluded from the *Act respecting labour standards*.[174] A sitter therefore has no minimum labour standards, such as minimum wage, statutory holidays, etc. A number of organizations have spoken out against this situation and argued for the inclusion of these workers in the *L.S.A.*[175] Their special

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173 *Supra*, note 170.

174 Section 3 (2), L.S.A., *supra*, note 170.

175 On the issue of the exclusion of sitters from the *L.S.A.*, see Quebec, CONSEIL DE LA FAMILLE, *supra*, note 142; ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE DE MONTRÉAL, *supra*, note 6. For reasons having to do with the financial resources of employers, the Comité interministériel d'étude des conditions de travail des aides familiales recommends the partial application of the *L.S.A.* to sitters: the provisions respecting the minimum wage and the length of the standard workweek would not apply to them. See COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES *supra*, note 6. For the same reasons, the Conseil du statut de la femme adopted the same position. See CONSEIL DU STATUT DE LA FEMME,

status may make them desirable to employers, because their salary is lower than that of a domestic subject to the *L.S.A.* However, the amount of housework included in a sitter's duties raises questions of interpretation.[176] A sitter may do housework as a secondary function, related to the needs of the person under her supervision or care. However, when her duties go beyond that, she is regarded as a "domestic" [*domestique*] and subject to the *L.S.A.*

1.1 Minimum Wage and Standard Workweek

The standard contract in Quebec[177] for an immigrant live-in caregiver provides that the *Act respecting labour standards*[178] applies to her. That Act refers to her as a "domestic."[179] Like other workers, an immigrant live-in caregiver is therefore entitled, for example, to paid vacation, statutory holidays, time off for family events, notice of termination of employment, and recourse against the employer for failure to comply with the Act.

However, there are two labour standards that do not apply to this type of worker, namely, the minimum wage and the standard workweek. She is entitled to a minimum wage lower than that of a caregiver who does not live in, namely, $271 per week[180] for 49 hours of work, which amounts to $5.53 per hour, while a caregiver who does not live in is entitled to a minimum wage[181] of $6.90 per hour.[182] Furthermore, a live-in caregiver must work more

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MAIN-D'OEUVRE FÉMININE ET NORMES DU TRAVAIL, *Mémoire présenté à la Commission des affaires sociales sur l'avant-projet de loi modifiant la Loi sur les normes du travail*, Québec City, February 1990. The Government of Quebec wants to bring sitters under the *L.S.A.* See Rober DUTRISAC, "Sus aux 'faux' travailleurs autonomes, Québec s'attaque à la revision de la Loi sur les normes du travail," *Le Devoir*, Montréal, May 23, 2000, p. A-1.

176 See *Commission des normes du travail* v. *Poulin*, [1999] J.Q. No. 343 (C.Q.) (Q.L.). In that case, it was decided that the worker was a "domestic" within the meaning of the Act, and not a "caregiver," because she also did housework in addition to caring for the children. Caregiving was not her exclusive function. Consequently, she was entitled to the benefits provided in the *L.S.A.* The employer had to compensate her.

177 *Supra*, note 7. If the standard contract provides that an immigrant live-in caregiver will only look after children and not do domestic work, we believe that she would not be considered to be a sitter [*gardienne*] for the purposes of the *L.S.A.* and that she would in fact be covered by that act, even though a sitter [*gardienne*] is not so covered, because the standard contract expressly provides that an immigrant live-in caregiver [*aide familiale résidante*] is subject to that act.

178 *Supra*, note 170.

179 Section 1(6), *L.S.A.*, *supra*, note 170.

180 Section 5, *Regulation respecting labour standards*, R.R.Q., c. N-1.1, r. 3.

181 On the subject of exceptions to the minimum wage, see s. 2, *Regulation respecting labour standards*, *idem.*

182 Section 3, *Regulation respecting labour standards*, *supra*, note 180.

hours per week before being entitled to overtime pay, namely 49 hours[183] as opposed to 41 hours[184] for a caregiver who does not live in or the majority of other workers.[185]

These differences in treatment have significant financial consequences for a live-in caregiver. First, she must work eight hours more per week than most other workers before being paid overtime.[186] Second, her overtime is not remunerated at the same hourly rate. For each hour of work after 49 hours per week, she receives $8.29 per hour, one and a half times her regular hourly rate, which is $5.53 ($5.53 per hour x 1.5 = $8.29 per hour). Other workers are entitled to $10.35 per hour for overtime, one and a half times their regular hourly rate,[187] which is $6.90 ($6.90 per hour x 1.5 = $10.35 per hour). Hence, the more hours a live-in caregiver works, the greater the discrepancy in salary between her and other workers earning a minimum wage.

For example, let us compare the salary of a live-in caregiver who works a 49-hour workweek, i.e., a normal workweek, with the salary of another worker who is earning the minimum wage. A live-in caregiver receives $271.00 gross, her base salary. The other worker, who may be a caregiver living out, receives $365.70 gross ($282.90 for 41 hours' work at $6.90 per hour plus 8 hours of overtime, 8 hours x $10.35 = $82.80). There is a difference of $94.70 gross per week between the two workers, or a monthly difference of $378.80 gross.

Let us do the same calculation for a 60-hour workweek, which is the normal workweek for some live-in caregivers. The live-in caregiver receives $362.19 gross (base salary of $271.00 for 49 hours of work, and 11 hours of overtime, 11 x $8.29 = $91.19). The other worker, who has worked a 60-hour week, receives $479.55 gross (salary of $282.90 for 41 hours of work at the minimum hourly rate, and 19 hours of overtime, 19 hours x $10.35 = $196.65). There is a difference of $117.36 gross per week between the two workers for the same number of hours, a monthly difference of $469.44 gross.

At first glance, the salary difference is hard to justify, particularly when we compare the salary of a live-in caregiver with that of a caregiver who does not live in but performs the same duties. However, this requires further consideration. Since 1998, a live-in caregiver in

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183 Section 8, *Regulation respecting labour standards*, *supra*, note 180.

184 Section 52, *L.S.A.*, *supra*, note 170. The maximum workweek will be reduced to 40 hours on October 1, 2000.

185 For workweeks over 41 hours, see ss. 8 to 13, *Regulation respecting labour standards*, *supra*, note 180.

186 At the worker's request, the *L.S.A.* allows payment for overtime to be substituted by time off, which must be equal to the number of hours of overtime worked plus 50 percent. Section 55(2), *L.S.A.*, *supra*, note 170.

187 Section 55(1), *L.S.A.*, *supra*, note 170.

Quebec has been entitled to free room and board.[188] It should be noted that this is not the case in all the other Canadian provinces. In British Columbia, a live-in caregiver must pay a maximum of $325 per month for room and board.[189] In Ontario, she can spend up to $341 per month for a private room with a lock and meals ($126.80 for the room and $214.60 for meals).[190] How much would it cost a caregiver in Quebec for food and lodging, if she were not living with her employers? Certainly more than $378.80 gross, which is the additional monthly amount earned for a 49-hour week by a caregiver who does not live in. Hence, the fact that a live-in caregiver does not earn the minimum wage, and that she works 49 hours per week instead of 41 hours, does not put her at a disadvantage at the end of the day because she receives free room and board. Furthermore, she has no transportation expenses.

Let us do the same calculation, this time comparing a live-in caregiver working in Montréal with a live-in caregiver working in Toronto. For a 49-hour week, the caregiver in Toronto earns $352.77 gross (minimum wage of $6.85 per hour x 44 hours = $301.40, plus 5 hours of overtime at 1.5, or $51.37), which makes $1,411.10 gross per month. From that we must subtract the cost of room and board, $341.00 per month. She is left with $1,070.10 gross per month, before deductions. The live-in caregiver in Montréal receives $271.00 gross, or $1,084.00 per month. Nothing can be taken off for room and board. If we assume that deductions are identical, the worker in Montréal is better off financially, even with a lower minimum wage and working more hours per week, than her counterpart in Toronto.

As for the live-in caregiver in Vancouver, she earns $382.52 gross for a 49-hour week (minimum wage of $7.15 per hour x 40 hrs. = $286.00, plus 9 hours of overtime at $10.72 per hour ($7.15 x 1.5) = $96.52), or $1,530.10 gross per month, from which $325.00 per month is taken off for room and board. She is therefore left with $1,205.10 gross per month. Obviously, the cost of living is much higher in Vancouver than in Montréal, where, remember, a caregiver receives $1,084.00 gross per month.

Even if a live-in caregiver in Quebec is better off in the end, due to the fact that she receives free room and board, we recommend that she should be paid the same minimum wage as the majority of other workers, and that her workweek be the same.[191] First of all, our

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188 Section 51.0.1, *L.S.A.*, *supra*, note 170, in force February 1, 1998; see s. 4, *Act to amend the act respecting labour standards*, 1997, S.Q., c. 72. See also clause 9 of the standard contract, *supra*, note 7. For other occupations, when the employee must live in the home of the employer, it costs that employee $160 per month for room and board, s. 6, *Regulation respecting labour standards*, *supra*, note 180.

189 Section 14, *Employment Standards Regulation*, B.C. Reg. 396/95.

190 See the Web site of the Ontario Ministry of Labour, http://www.gov.on.ca/LAB/es/dome.htm (accessed on April 10, 2000).

191 A number of organizations have recommended this: ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE DE MONTRÉAL, *supra*, note 6; COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6; CONSEIL DU STATUT DE LA FEMME, *supra*, note 175. The

demonstration of the advantage to the live-in caregiver of having free room and board works only if she is paid for overtime. And herein lies the problem. The experience of these workers shows that overtime, resulting from the obligation to live in the home of the employer, is rarely paid.[192] Thus the advantage of free room and board begins to fade in view of the hours actually worked. Second, even if she is paid for all the hours worked, the responsibilities imposed on her, her lack of privacy, her constant availability and subordination should entitle her to a minimum wage and a standard workweek as well as free room and board. Moreover, the difference in treatment reflects the historical failure to recognize the value of domestic work, and the idea that it is free labour. Making domestic work more attractive could also alleviate the shortage of workers in this field. Other provinces, such as Manitoba,[193] British Columbia,[194] Ontario,[195] Saskatchewan, Newfoundland and Prince Edward Island, have already standardized the minimum wage for live-in and non-live-in caregivers.[196]

In addition to allowing live-in caregivers the same minimum wage and the same regular workweek as the majority of workers, we recommend that their room and board be provided free of charge in all provinces. This measure is justified in view of the responsibilities assumed by a live-in caregiver, the lack of privacy and her constant availability. In addition, this may attract Canadian workers and respond to the need for childcare services. The argument that making the costs too high for employers might lead to an increase in black market labour can be countered by financial assistance to families.[197]

Conseil du statut de la femme repeated its 1990 recommendations in a letter sent by its president, Diane Lavallée, to the Quebec Minister of Labour, Diane Lemieux, on May 4, 2000.

192 See NATIONAL ACTION COMMITTEE ON THE STATUS OF WOMEN and TORONTO ORGANIZATION FOR DOMESTIC WORKERS' RIGHTS (INTERCEDE), *Domestic Worth Project*, Toronto, September 1993; Karen SERWONKA, *The Bare Essentials: A Needs Assessment of Foreign Domestic Workers in Ontario*, Toronto Organization for Domestic Workers' Rights (Intercede), Toronto, May 1991.

193 The minimum wage is $6.00 per hour. See s. 11, *Minimum Wage and Working Conditions Regulation*, Man. Reg. 62/99.

194 The minimum wage is $7.15 per hour. See s. 15, *Employment Standards Regulation*, *supra*, note 189. The workweek is 40 hours; see s. 35, *Employment Standards Act*, *supra*, note 60.

195 The minimum hourly wage is $6.85 for a 44-hour week. See s. 23, *Employment Standards Act*, R.S.O., c. E-14; s. 10, *Employment Standards Act General*, R.R.O. 1990, Reg. 325; s. 3, *Employment Standards Act, Domestics, Nannies and Sitters*, R.R.O. 1990, Reg. 322.

196 See COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, p. 25.

197 Although there are statistics showing that families who employ the services of a live-in caregiver have rather high incomes, a financial contribution by government to families wishing to hire a caregiver can be justified. For example, lower-income families could then

RECOMMENDATIONS

13. **We recommend that provincial governments set the same hourly wage for live-in caregivers as for other workers.**

14. **We recommend that provincial governments require employers to provide free room and board to live-in caregivers.**

15. **We recommend that provincial governments make the standard workweek, applicable to the majority of workers, applicable also to live-in caregivers.**

1.2 Definition of Hour Worked

The issue of the minimum hourly wage leads to that of defining "hour worked." The obligation to live in the home of the employers can result in many abuses, including unpaid and excessive overtime. Because the caregiver lives on site, it is always tempting to ask her just to "watch" children who are asleep for a few hours. Or employers may go on vacation and leave the caregiver with responsibility for the children. Employers often consider these overtime hours not as work but as a "service."[198]

To rectify this situation in France, the Convention collective nationale de travail du personnel employé de maison [national collective agreement for workers employed in the home][199] distinguishes between hours of actual work and hours when the worker is present and responsible for chores of a family nature. The latter include hours spent minding someone in a family setting without actually working, and the remuneration cannot be less than two thirds of the hourly wage for actual work.[200] This solution may be worth considering with regard to payment for hours of being present and responsible. Indeed, it might get support from employers, who refuse to pay the full rate but would be prepared to pay a lower wage for this type of work. However, as one author has commented,[201] employers could use this distinction to the detriment of the caregiver. Thus, employers might try to consider hours spent in the park with the children as hours when the caregiver is present and responsible, rather than hours of actual work, in order to reduce wages. For that reason such a distinction might be disadvantageous for a caregiver. To avoid any confusion, an hour of work should be

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hire these workers to care for children or the elderly. See CONSEIL DE LA FAMILLE, *supra*, note 142.

198 See *supra*, note 192.

199 Clause 25, Convention collective nationale. This collective agreement, adopted in 1980, covers all employers of employees in the home [*employés de maison*], whether or not they are affiliated with a syndicate of signatory employers. On this subject, see "employé de maison," *Liaisons sociales*, *supra*, note 4, p. 9; Jean-Yves KERBOURC'H, "Le régime du travail domestique au regard du droit du travail," (1999) 4 *Droit social* 335.

200 See *Liaisons sociales*, *supra*, note 4, p. 27.

201 See A. BLACKETT, *supra*, note 45, p. 19.

an hour when the caregiver is available to her employer and cannot leave the workplace, as provided for in section 57 of the *Act respecting labour standards*.[202]

However, it might be appropriate to distinguish between hours worked during the day and those worked at night, as in the case where parents, while on vacation, leave a live-in caregiver in charge of the children for a few days, or where parents must be away because of their work. Night work then consists of ensuring the presence of someone responsible for the children; without actually working, the person is obligated to do so if necessary. The caregiver, therefore, can sleep during this time. There are three possible solutions to the wage issue. First, in the case where parents are away overnight, the hourly rate for the night would be the same as for the day. It seems to us that employers are not very likely to comply with this solution. Second, the night-time hourly rate could be a fixed proportion of the regular hourly rate, for example, one half.[203] It seems to us that there is a greater likelihood of compliance with this solution than the full hourly rate. Third, the base salary could be increased to cover hours spent "minding." In that case, there would be no overtime to pay. The second approach, i.e., one half the regular wage, seems to us to be preferable, since the other recommendations could lead to abuse. There is also the question of the night-time hourly rate, where a caregiver's services may be required, for example, when children are sick or require watching. Those hours should be regarded as hours when she is required to be present and responsible, and remunerated at two thirds the hourly wage for actual work.[204]

RECOMMENDATION

16. We recommend that provincial legislation with respect to minimum labour standards distinguish between night-time and daytime hours of work, and that night-time hours of work be paid at half the regular hourly rate. Where the services of a live-in caregiver are required during the night, she should be paid two thirds the regular hourly rate.

1.3 Registry of Employers

Non-compliance with labour standards is one of the main problems confronted by a live-in caregiver. To encourage compliance with these laws, a number of caregiver rights associations have proposed that a registry of employers be established.[205] This measure, which could be

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202 *Supra*, note 170.

203 French law provides for one sixth of the regular hourly wage. See *Liaisons sociales*, *supra*, note 4, p. 27. As we specified earlier, in Quebec a "sitter" [*gardienne*] within the meaning of the *Labour Standards Act*, *supra*, note 170 [a worker whose employment does not include domestic duties] is not subject to that law. The minimum wage therefore does not apply to her.

204 See *Liaisons sociales*, *supra*, note 4, p. 27.

205 See ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE DE MONTRÉA, *supra*, note 6; INTERCEDE, *Response to the Proposed Reform of the Ontario Labour Relations Act*, Toronto, February 1992.

incorporated into the *Act respecting labour standards*,[206] would make it possible to identify employers of caregivers, so that they could then be informed of the contents of the Act. The registry could be used to inspect their premises and ensure compliance with the Act. It could also be used to identify bad employers. Obviously, such a measure could present problems in terms of violating the employer's privacy, since the workplace is the employer's home.[207] However, the advantages to the live-in caregiver seem to us to outweigh the disadvantages to the employer. As employers are individuals who may not be familiar with the Act, a registry of employers would be a good way of informing the people involved.

British Columbia adopted this type of registry in 1995.[208] Because employers were not registering their live-in caregivers, the Canada Human Resources Centre, which validates job offers presented by future employers of immigrant live-in caregivers, now informs employers in that province of the obligation to register their caregivers in the registry within 30 days after they are hired. The employment agency that finds a live-in caregiver for an employer must also inform the employer of the obligation to register his or her employee in the registry,[209] failing which the agency's operating licence may be revoked or suspended. As a result, the number of employers who register has increased significantly.[210] The registry is used mainly to send out information about minimum labour standards.

RECOMMENDATION

17. We recommend that provincial governments establish a registry of employers.

1.4 "Employment-Service Cheques"

While a registry is a good method of ensuring compliance with the legislation, there are other mechanisms that could help in this regard. The French experience with "employment-service [*emploi-service*] cheques"[211] might be useful for Canadian provinces. Adopted in 1994, this method of payment and providing social benefits was created for the benefit of employers and employees in situations of employment in the home. An individual who employs a domestic helper [*aide domestique*], obtains an employment-service chequebook

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206 *Supra*, note 170. The equivalent legislation in British Columbia has included this. See *supra*, note 60.

207 See COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, p. 38, which rejected this proposal for that reason.

208 Section 15, *Employment Standards Act*, *supra*, note 60.

209 Section 4(d), *Employment Standards Regulation*, *supra*, note 132.

210 Telephone conversation in March 2000 with Silvia Tobler, a representative of the West Coast Domestic Workers' Association in Vancouver.

211 On this subject, see COMITÉ INTERMINISTÉRIEL D'ÉTUDE DES CONDITIONS DE TRAVAIL DES AIDES FAMILIALES, *supra*, note 6, Appendix 2; *Liaisons sociales*, *supra*, note 4, p. 23.

from the bank containing 20 cheques and 20 social benefit sheets. The employer also fills out an authorization for social benefit premiums to be deducted. The cheque itself, dated and signed by the employer, is used to pay the employee. The social benefit sheet, which the employer uses to fulfil his or her social benefit obligations, must be filled out and sent by the employer to the Centre national de traitement du chèque-service (national centre for processing employment-service cheques). The Centre calculates the premiums to be paid by the employer and informs the employer every month, by sending a notice to the employer's home, of the amount of the premiums to be deducted from his or her account. It also calculates the social benefit charges for each employee, and sends the employee a statement of employment every month detailing the employee's activities in that month; this may be used by the employee for claiming any future social benefits.

This system has numerous advantages for individual employers. It simplifies the hiring of people to work in the home as well as the paperwork. In France, the employer receives a tax deduction. There are advantages for the domestic helper also. She has the protection of social benefits (employment insurance, protection in the event of work accidents, retirement plan). This arrangement also helps to combat black market employment.

Taking their inspiration from French experience, the provinces should establish a system of employment-service cheques. However, the costs of implementing such a system in Canada have to be determined. In doing that calculation, we must bear in mind that the work of a domestic helper [*aide domestique*] involves only caring for children. In the context of government cutbacks to health care and an ageing population, dependent people, such as the elderly and the disabled, will require home care.

RECOMMENDATION

18. We recommend that the provincial governments establish a system similar to the employment-service cheque system in effect in France.

1.5 Measures to Ensure Compliance with the Act

Even the best law is useless if it is not complied with and the penalties therein are not applied. Live-in caregiver rights organizations have demanded more severe penalties for employers who fail to comply with the *L.S.A.*[212] The issue of penalties calls for comment on two fronts. First, there is the issue of informing employers about the provisions of the Act. This could be accomplished by a registry of employers, as described above, and by live-in caregiver advocacy groups, which provide information to their members. If both parties are well informed about minimum labour standards, employers will not be able to plead ignorance.

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212 See ASSOCIATION POUR LA DÉFENSE DES DROITS DU PERSONNEL DOMESTIQUE DE MONTRÉAL, *supra*, note 6, p. 21; TORONTO ORGANIZATION FOR DOMESTIC WORKERS' RIGHTS (INTERCEDE), *Submission to the Standing Committee on Resources Development Regarding Bill 49, An Act to Improve the Employment Standards Act*, Toronto, September 1996.

Nevertheless, information is only one stage of compliance with the law. In some cases, filing a complaint is the only way a worker can obtain her due. However, the procedure is problematic for a worker who lives in the home of her employers. In fact, it seems that immigrant live-in caregivers file very few complaints with the CNT.[213] Ideally, proactive measures by the CNT, such as surprise inspections of the workplace, would be preferable. Taking into account the resources required for such inspections, it is unlikely that they will be implemented. Here again, live-in caregiver advocacy groups could be called upon to assist workers to file complaints with the CNT. We repeat our recommendation that these organizations receive funding to enable them to perform this function.

In addition, a time limit for making a complaint to the CNT of one year[214] from the date the payment was due can be problematic. Even if a worker knows her rights,[215] she may be afraid to discuss the matter with her employers or to make a complaint against them. She may prefer to change employers or obtain permanent resident status before filing a complaint. To genuinely enable a live-in caregiver to exercise her rights, the one-year limitation period for filing a complaint should be extended, or the authorities should at least take into consideration the reasons why the worker did not file a complaint sooner. In some cases, those reasons could amount to her inability to act, which would result in a suspension of the time limit.[216]

RECOMMENDATION

19. We recommend that the body responsible for the enforcement of minimum labour standards take into consideration the reasons why a live-in caregiver did not file an earlier complaint against her employer.

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213 Only one case involving the hiring of an immigrant live-in caregiver is available in the data bank. See *Benchetrit* v. *Guzman*, [1998] Q.J. No. 2283 (C.Q.) (Q.L.), in which the immigrant live-in caregiver, sued by her employer for having terminated the employment contract, stated that she had been forced to sign a second contract totally different from the first, and disadvantageous to her, because she had already invested a lot of money and had no other choice. The judge set aside the second contract but did not award damages to the worker because she had filed a complaint with the Commission des normes du travail, which would possibly be able to compensate her.

214 Section 115, *L.S.A.*, *supra*, note 170.

215 Ignorance of one's rights is not grounds for suspending the time limit.

216 On the issue of suspending the time limit because it is impossible to act, see art. 2904 C.C.Q. On the issue of psychological inability to act, see *Gauthier* v. *Lac Brôme (Ville)*, [1998] 2 S.C.R. 3. On the issue of compensation for victims of crime, the courts have interpreted very liberally the one-year limitation on filing an application for compensation under the *Crime Victims Compensation Act*, R.S.Q., c. I-6,. See Nathalie DES ROSIERS and Louise LANGEVIN, *L'indemnisation des victimes de violence sexuelle et conjugale*, Cowansville, Quebec: Les Éditions Yvon Blais inc., 1998, p. 201, No. 365.

2 The *Act respecting industrial accidents and occupational diseases*

Section 2 of the *Act respecting industrial accidents and occupational diseases* (*I.A.O.D.A.*)[217] excludes "domestics"[218] and "caregivers" [*gardiennes*][219] from the definition of "worker." Thus, domestics (the term includes live-in caregivers) and caregivers are not automatically covered by that act in the event of an industrial accident,[220] unlike most other workers. However, in order to be protected in the event of an accident, a domestic, but not a caregiver, may take the initiative to register with the Commission de la santé et de la sécurité au travail [occupational health and safety board] (CSST) and pay her own premiums.[221]

A domestic (this includes a live-in caregiver) as well as a caregiver [*gardienne*] as defined in the Act, should be covered by the *I.A.O.D.A.*,[222] and employer premiums should be mandatory, as is the case in Ontario[223] and British Columbia.[224] First of all, the vast majority of workers have this kind of protection.[225] Besides being discriminatory with regard to live-in caregivers, the difference in treatment sustains the prejudice that domestic work is not work, and that it therefore cannot be dangerous. The fact is, however, that domestic tasks, and the home itself, are often a source of injury,[226] especially back injuries and poisoning by noxious cleaning

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217 *Supra*, note 167.

218 A domestic, within the meaning of the Act, is "a natural person engaged by an individual for remuneration, whose main duty is, in the dwelling of the individual, (1) to do housework, or (2) to care for a child or a sick, handicapped or aged person and who lives in the dwelling." Section 2, *I.A.O.D.A.*, "domestic," *supra*, note 167.

219 A caregiver is a natural person who is employed by an individual to care for a child or a sick, handicapped or aged person, and who does not live in that individual's dwelling. Section 2, *I.A.O.D.A.*, "worker," *supra*, note 167.

220 Section 7, *I.A.O.D.A.*, *supra*, note 167.

221 Sections 18, 20 and 21, *I.A.O.D.A.*, *supra*, note 167.

222 *Supra*, note 167.

223 *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A.

224 *Workers Compensation Act*, R.S.B.C. 1996, c. 492, s. 1, definition of "worker," paragraph (a).

225 In s. 2, *I.A.O.D.A.*, *supra*, note 167, in the definition of "worker," the Act excludes three categories of workers: a domestic; a natural person engaged by an individual to care for a child or a sick, handicapped or aged person and who does not live in the dwelling of the individual (*gardienne*); and a person who plays sports as his or her main source of income. Also excluded are self-employed workers, who may register with the CSST. See s. 18, *I.A.O.D.A.*, *supra*, note 167.

226 See the three tables describing the potential dangers of domestic work in *Double Exposure*, 1984, reproduced in TORONTO WORKERS' HEALTH AND SAFETY LEGAL CLINIC and INTERCEDE, *Joint Submission of the Toronto Workers' Health and Safety Legal Clinic and*

products. The exclusion of domestic workers also reinforces the hierarchical distinction between the private and public spheres. Second, the possibility of a domestic worker's registering with the CSST is non-existent. Immigrant live-in caregivers are generally unaware of this possibility and, even if they did know about it, the coverage would be expensive for them. A domestic worker would have to spend $4.72 annually to be insured for $100.00. For example, if a domestic worker wants to be insured in the amount of $14,092.00, which is her gross annual salary ($271.00 per week x 52 weeks), it would cost her $730.00.[227] In the event of an industrial accident within the meaning of the *I.A.O.D.A*,[228] she would then receive 90 percent of her net salary. It must be pointed out that she would not enjoy complete coverage. For example, she would not be compensated for injuries suffered after working hours or those not caused by an industrial accident within the meaning of the *I.A.O.D.A*. According to information obtained from the CSST, this body does not insure even one live-in caregiver.

The protection offered by the *I.A.O.D.A*.[229] in the event of an industrial accident is not the only option. A caregiver, or her employers, could consider wage insurance. Our research indicates that insurance companies will not insure live-in immigrant caregivers. They give three reasons. First, it is difficult to prove disability since a caregiver lives at her workplace. How can they be sure that she is not doing light housework? Second, because a live-in caregiver already receives free room and board, she has the basic necessities. The inference is that she would not need insurance. Finally, her temporary status is a cause for concern to insurers: how can a claim be proven if it is made by a caregiver who has returned to her home country? In short, these women seem to present too high an insurable risk for insurance companies. On the other hand, should an injury occur in the performance of her work, a caregiver could initiate an action against her employers pursuant to the *Civil Code of Québec* for failure to provide her with a safe workplace.[230] Obviously the possibility of launching such an action is highly theoretical given the caregiver's vulnerable position.

Intercede to Bob Mackenzie, Minister of Labour, Regarding the Exclusion of Domestics Under the Occupational Health and Safety Act, Toronto, October 1990.

227 In effect, $271.00 per week x 52 weeks x 4.72% = $665.00 + $65.00 annually in fixed administrative fees = $730.00. See *Regulation amending the Regulation respecting the classification of employers, the statement of wages and the rates of assessment, An Act respecting industrial accidents and occupational diseases*, Quebec Official Gazette, Part II, September 29, 1999, Vol. 131, No. 39, p. 3119. According to *Schedule 1, Classification Units and Rates of Assessment for the Year 2000*, the classification unit for a live-in caregiver is No. 75040.

228 See the definition of "industrial accident," s. 2, *I.A.O.D.A.*, *supra*, note 167.

229 *Supra*, note 167.

230 Article 2087 C.C.Q. If the worker proves fault or negligence on the part of her employer, the employer's home insurance policy will usually cover this type of claim.

The exclusion of domestic workers from the *I.A.O.D.A.*[231] seems to have been permitted to avoid heavy expenses for employers, which could encourage black market employment. The argument does not hold if we recognize the principle that all workers must be treated in a non-discriminatory manner. To prevent an underground labour force, other measures must be proposed to lighten the burden of the employer-parents, such as financial assistance for parents who hire a caregiver in their home.[232]

RECOMMENDATION

20. We recommend that provincial governments include live-in caregivers in the legislation providing protection and compensation for industrial accidents and occupational diseases, and that employer premiums be mandatory.

3 The *Act respecting occupational health and safety*

The *Act respecting occupational health and safety* (*O.H.S.A.*)[233] should apply to live-in caregivers, including its provisions with regard to preventive re-assignment as provided by that act.[234] After some hesitation, the Quebec courts have now held that a pregnant domestic worker is entitled to preventive re-assignment.[235] Such protection helps to reinforce the concept that domestic work is work and that it can be dangerous. All workers should be covered by that act.

4 Action for Infringement of the Right to Equality

An immigrant live-in caregiver is either excluded from the provisions of certain statutes, such as the *I.A.O.D.A.*,[236] or treated differently from other workers, as under the *L.S.A.*[237]

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231 *Supra*, note 167.

232 See CONSEIL DE LA FAMILLE, *supra*, note 142.

233 *Supra*, note 172.

234 Sections 40 to 48, *O.H.S.A.*, *supra*, note 172.

235 The courts have been hesitant to give a pregnant domestic this right because of the definition of "establishment," which excludes "private lodging facilities," s. 1, *O.H.S.A.*, *supra*, note 172. See *Commission de la santé et de la sécurité du travail et Lebel*, [1997] C.A.L.P. 1470 (C.A.L.P.), which gave a pregnant domestic this right. In Ontario, a domestic does not have this protection. See s. 3, *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, which exempts "work performed by the owner or occupant *or a servant of the owner or occupant* to, in or about a private residence" [*italics added*].

236 *Supra*, note 167.

237 *Supra*, note 170.

As we demonstrated earlier, she is certainly a victim of discrimination. First, the special treatment reserved for her in the *L.S.A.*,[238] which provides for minimum labour standards, is a problem. How can we justify one category of workers' not being treated like other workers by a statute that sets out the minimum standard for working conditions?[239] As for the *I.A.O.D.A.*,[240] why are certain workers, a majority of whom also happen to be women who are underpaid and often poorly educated, excluded from that act? These statutes violate the right to equality protected by section 15(1) of the Canadian Charter,[241] or the right to dignity provided in section 4, or the right to equality provided in section 10 (a distinction based on race, sex, colour or ethnic or national origin, and social condition) and section 19 (discrimination in conditions of employment) of the Quebec Charter.[242]

However, we do not recommend initiating such proceedings for the same reasons we explained earlier regarding the LCP. First, it may be difficult to find a caregiver who wants to make a complaint. Second, who would fund this action? If the courts decided in favour of the complainant, how many women would benefit? Furthermore, the court has limited ability to act. It may declare certain provisions of a statute unconstitutional because they are contrary to the principle of equality, but it cannot tell the legislature how to amend the statute. Following such a decision, we would have to wait for a legislative amendment in order to enjoy the full benefit of legal recourse.

RECOMMENDATION

21. We recommend that provincial governments include caregivers in occupational health and safety legislation.

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238 *Supra*, note 170.

239 See Maurice DRAPEAU, *Conformité avec la Charte des droits et libertés de la personne du projet de loi : Loi modifiant la Loi sur les normes du travail*, Commission des droits de la personne du Québec, November 2, 1990, p. 2 ff.

240 *Supra*, note 167.

241 See David M. BEATTY, *Putting the Charter to Work: Designing a Constitutional Labour Code*, Kingston, Ontario / Montréal: McGill-Queen's University Press, 1987, p. 92.

242 We have excluded an action under s. 46 of the Quebec Charter. That section states: "Every person who works has a right, *in accordance with the law*, to fair and reasonable conditions of employment which have proper regard for his health, safety and physical well-being" [*italics added*]. Apparently that section only guarantees the right of every worker to have conditions of employment *as provided by law*. Accordingly, if the legislature provides for different conditions of employment for certain workers, there would be no grounds for a complaint under s. 46 of the Quebec Charter. We have taken this interpretation from the decision in *Gosselin* v. *Québec (Procureur général)*, [1999] J.Q. No. 1365 (C.A.) (Q.L.).

5 Unionization

Taking into account the non-compliance with minimum labour standards where live-in caregivers are concerned, considering that it is virtually impossible for them to negotiate with their employers, and in view of their vulnerability, unionizing them could be a worthwhile approach.[243] This experiment has already been tried in British Columbia. However, it met with limited success because the workers, isolated in private homes with few opportunities to talk to other women, worked long hours with no time to devote to unionizing, had no private life, and in some cases did not think of themselves as workers.[244]

In Quebec, live-in caregivers could, in theory, unionize. However, multi-employer certification is not permitted,[245] i.e., an application for certification must be filed for each employer. In almost every case there would be a bargaining unit composed of one employee, and a collective agreement for each employer. In these circumstances, unionization would serve no purpose. First of all, the process would be expensive for the union. Second, as the worker would be the only person in her bargaining unit, her bargaining power with the employer would be very weak. And even if multi-employer certification were permitted, unionizing would not ameliorate the working conditions of the women. If they went on strike or the employer locked them out, they would lose their homes and would also be in breach of the obligation to live in the home of the employer as required by the federal program, and this would result in their expulsion from the country! The gravity of the problems created by the LCP's requirements is evident with regard to the unionization of these workers.

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243 See the following reports, which have proposed this: INTERCEDE, *Intercede's Response to the "Proposed Reform of the Ontario Labour Relations Act,"* Toronto, February 1992, p. 12 ff.; ONTARIO DISTRICT COUNCIL OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION and INTERCEDE, *Industrial Homeworkers and Domestic Workers: Proposals for Improved Employment Legislation and its Enforcement and Proposals for Access to Collective Bargaining*, Toronto, February 1993. On the Ontario experience, see Judy FUDGE, "Little Victories and Big Defeats: The Rise and Fall of Collective Bargaining Rights for Domestic Workers in Ontario," in Abigail B. BAKAN and Daiva STASIULIS, eds., *Not One of the Family: Foreign Domestic Workers in Canada*, Toronto: University of Toronto Press, 1997, p. 119.

244 See R. EPSTEIN, *supra*, note 71, p. 228.

245 Section 21, *Labour Code*, R.S.Q, c. C-27. Quebec's Conseil du Statut de la femme recommends multi-employer certification to improve the working conditions of women. See CONSEIL DU STATUT DE LA FEMME, *Emploi atypique cherche normes équitables*, Government of Quebec, February 2000, p. 51. See also ONTARIO DISTRICT COUNCIL OF THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION and INTERCEDE, *Industrial Homeworkers and Donestic Workers: Proposals for Improved Employment Legislation and its Enforcement and Proposals for Access to Collective Bargaining*, *supra*, note 243.

Although unionization might improve the lives of these workers, better working conditions will come about, first and foremost, through changes in the eligibility requirements of the LCP and through non-discriminatory legislative treatment with regard to their working conditions. To accomplish this, however, the two levels of government will have to work together.

RECOMMENDATION

22. We recommend that the federal and provincial governments work together on legislative reforms affecting immigrant live-in caregivers.

Ameliorating the working conditions of these women raises an interesting question: will such improvements not be an incentive for more Canadian women to take this kind of employment, and could this not ultimately lead to the disappearance of the LCP?

Recommendations Concerning the Working Conditions of Immigrant Live-in Caregivers

12. We recommend that Canada ratify the *Migration for Employment Convention (Revised), 1949* (C97) and the *Migrant Workers (Supplementary Provisions) Convention, 1975* (C143).

13. We recommend that provincial governments set the same hourly wage for live-in caregivers as for other workers.

14. We recommend that provincial governments require employers to provide free room and board to live-in caregivers.

15. We recommend that provincial governments make the standard workweek, applicable to the majority of workers, applicable also to live-in caregivers.

16. We recommend that provincial legislation with respect to minimum labour standards distinguish between night-time and daytime hours of work, and that night-time hours of work be paid at half the regular hourly rate. Where the services of a live-in caregiver are required during the night, she should be paid two thirds the regular hourly rate.

17. We recommend that provincial governments establish a registry of employers.

18. We recommend that the provincial governments establish a system similar to the employment-service cheque system in effect in France.

19. We recommend that the body responsible for the enforcement of minimum labour standards take into consideration the reasons why a live-in caregiver did not file an earlier complaint against her employer.

20. We recommend that provincial governments include live-in caregivers in the legislation providing protection and compensation for industrial accidents and occupational diseases, and that employer premiums be mandatory.

21. We recommend that provincial governments include caregivers in occupational health and safety legislation.

22. We recommend that the federal and provincial governments work together on legislative reforms affecting immigrant live-in caregivers.

PART III CONTRACTUAL PRACTICES

When we submitted our research proposal, we had intended to analyse the contractual practices associated with hiring immigrant live-in caregivers. There were three contractual relationships to be examined in this connection: the relationship between the employment agency and the would-be caregiver; the relationship between the employment agency and the would-be employers; and the relationship between the employers and the immigrant live-in caregiver. Despite our efforts, we were unable to obtain a copy of a contract between an employment agency and a would-be caregiver, or between an employment agency and would-be employers. As for the contract between an employer and a caregiver, the federal government suggests one model and the Government of Quebec requires another. However, as this part of our study demonstrates, our inability to analyse these contracts was not an insuperable problem. We shall first consider the standard form contracts and then give our opinion as to their usefulness.

The standard form contract required by the Government of Quebec as a condition of eligibility for the federal program[246] includes the duration of the contract, a job description, hours of work, days off, salary and the number of weeks of vacation. It also stipulates that the employer undertakes to facilitate access by the live-in caregiver to French courses outside normal working hours. It specifies that the employer undertakes to provide the caregiver with meals and a private room that is adequately furnished, heated and ventilated. It says that the room must have a door equipped with a lock and safety bolt. The employer must also give the worker a key to the house. There is a section of the contract dealing with the benefits the employer may offer, such as a pension fund and sick leave, and a clause dealing with the possibility of the employer's paying for the worker's travel expenses between her country of origin and Canada. It is clearly stated that the employer may not withhold a portion of the employee's salary to pay for travel expenses. Finally, the contract states, in bold letters, that the employer must comply with the *Act respecting labour standards*. As for the Department of Citizenship and Immigration Canada, it strongly suggests that immigrant caregivers sign a standard contract.[247] The content of that contract is similar to the Quebec contract. However, the federal department clearly informs workers that it is not a party to the contract, and that because of the division of powers it has no right to intervene in the employer-employee relationship to enforce the contract.[248] Other provinces also require the parties to sign a contract.[249]

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246 Section 50(1)(f)(iv) of the *Regulation respecting the selection of foreign nationals* (*supra*, note 7) requires that a contract be signed. The standard form contract is included in the kit provided to the caregiver. A copy of the completed and signed contract is kept at the Canada Human Resources Centre and at the Ministère des Relations avec les citoyens et de l'Immigration du Québec.

247 CITIZENSHIP AND IMMIGRATION CANADA (*supra*, note 19), p. 6. See the model proposed at p. 31.

248 *Idem*, p. 6.

249 See, in British Columbia, s. 14, *Employment Standards Act*, *supra*, note 60.

The government requirement of a signed standard form contract is definitely an essential step toward protecting the rights of immigrant live-in caregivers. It changes the status of the relationship between the parties from underground to official. In principle, signing a contract suggests the parties have negotiated and reached agreement, and understand the extent of their obligations. The contract is described as a tool to provide the worker with protection and foreseeability. The federal government brochure provided to caregivers states: "The objective of setting out the relationship in a contract is to get the fairest working arrangement possible for both you and your employer. A contract can help to avoid future problems by protecting your rights and providing a clear statement of your obligations."[250] In fact, if there were no requirement to sign an employment contract, we would be the first to insist on it.

Nevertheless, signing a contract does not solve all problems, even if its content is mandatory and it attempts to protect the caregiver. First of all, the contract cannot operate as an instrument of contractual justice unless there is a real opportunity for negotiation between the parties, which is not always the case given the position of inferiority of the caregiver.[251] Second, a problem arises in the event of non-performance of the contract. The worker may make a complaint to the CNT but it is doubtful whether an immigrant live-in caregiver, whose rights have been violated, will file a complaint. Often she does not know her rights or is afraid to exercise them because of her precarious status living in her employers' home. The contract would then be nothing but a sham to ease the conscience of the authorities. Even if its content is mandatory, the contract does not transform the relationship between the parties. In order for the contract to have any effect whatsoever, control over the employers must be ensured through the establishment of a registry, as we proposed earlier.

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250 *Supra*, note 19, p. 6.

251 See *Benchetrit* v. *Guzman*, *supra*, note 213.

CONCLUSION TO CHAPTER I

In this first chapter, we analysed the LCP with regard to the problem of trafficking in women. In the present context of economic globalization, which drives women from disadvantaged countries to migrate for the purpose of supporting their families and to accept conditions that Canadian citizens would not, the LCP should be abolished, because it constitutes a form of trafficking in women. While it usually does not lead to abduction or the use of force, fraud, deception or violence, it nonetheless makes possible the exploitation of women from Third World countries and violates their fundamental rights. In fact, by giving them temporary status for over 24 months, permitting them to work only for the employer whose name appears on their work permit, requiring them to live in the home of that employer and subjecting them to lower minimum labour standards than those applying to the majority of other workers, the program violates their rights to equality and dignity.

To rectify the inequity of this situation, we propose that the immigration selection criteria be changed. Since there is high demand for live-in caregivers in Canada and this situation will not be resolved unless a national childcare program is adopted, the selection criteria for the independent immigrant class should reflect this need and assign more points to these workers in recognition of their work experience. While waiting for those changes to be made, the existing LCP should be modified to respect the fundamental rights of these women. The changes should grant them permanent residence when they arrive in Canada, reduce the period of work as a live-in caregiver to 12 months, and eliminate the obligation to live in the home of the employer. Moreover, employment agencies should be regulated, immigrant caregiver rights groups should receive financial support and the workers should be given adequate information. Furthermore, the disparities between the working conditions of live-in caregivers and those of the majority of other workers cannot be justified in Canadian society. Minimum labour standards, laws protecting workers in the event of industrial accidents, and occupational health and safety legislation should apply to all workers, including immigrant live-in caregivers. Provincial governments should establish a registry of employers and an employment-service cheque system. Last, other measures could contribute to improving the living conditions of these workers, such as government financial assistance and tax deductions for the parent-employers. An exhaustive analysis of the situation of these women cannot ignore the absence of a national childcare program in Canada.

Domestic solutions may not be sufficient to solve this problem of international proportions. Canada must continue to provide financial assistance to developing countries in order to limit the migration of populations for economic reasons.

By failing to ameliorate the situation of these workers, the federal and provincial governments are perpetuating the idea that domestic work and the care of children and dependent persons are not important in Canadian society.

RECOMMENDATION

23. We recommend that the federal government continue to provide financial assistance to developing countries.

DISSENTING OPINION

The co-researcher wishes to express her disagreement with the proposal to eliminate the LCP. She fully supports the description and analysis presented by her colleague in this regard. She differs, however, on the conclusion. In effect, unlike her colleague, she is in favour of improving, rather than eliminating, the program.

In the co-researcher's opinion, the LCP is often the only door to Canada open to many women. She deplores the changes made to the program in 1992 because raising the eligibility requirements prompted a dramatic decrease in the number of immigrants accepted into the program. She is in favour of retaining the program because it allows these women to obtain permanent residence in Canada and find better jobs upon completion of their work as immigrant live-in caregivers, a role that fulfils Canada's needs. Abolishing the program would have the effect of closing the borders to women for whom immigration to Canada is their only chance to improve their lives.

On the other hand, in the co-researcher's opinion, improving the program would allow for the admission of immigrant live-in caregivers while ensuring them greater protection and a shorter period before obtaining permanent residence. While the co-researcher acknowledges that these women often find themselves in unpleasant and abusive circumstances, she believes that an improved program is more likely to provide them with protection. She is afraid that illegal immigration, which would result from the closing of Canadian borders, would put these women at even greater risk.

Finally, the co-researcher fully supports the proposal that the criteria for admission in the independent immigrant class under the *Immigration Act* be amended to provide for more equitable and egalitarian requirements. These amendments would allow for greater diversity among the new arrivals by taking into consideration factors other than educational and financial, and acknowledging the particular situation of women all over the world.

The positions taken by the two co-researchers reflect the differences of opinion that exist among individuals and organizations working with immigrant live-in caregivers.

CHAPTER II: "MAIL-ORDER BRIDES" IN CANADIAN LAW

INTRODUCTION

The "mail-order bride" phenomenon creates a relationship of dependence likely to lead to the exploitation of the women involved. It is based on introducing men and women from different countries through agencies that specialize in placing personal ads about potential wives in catalogues or on the Internet. The ultimate goal is an intercultural marriage between two people, with the objective of enabling the woman to immigrate. The result is a flourishing and lucrative industry involving the trafficking of women from the Third World to consumer-husbands in the First World.

The first impression on visiting the introduction Web sites and reading the catalogues is of personal ads for singles in the age of globalization.[1] The growing solitude of adults who have gone through difficult relationships, separations and divorces, coupled with the difficulty of meeting compatible, available people, leads many people to turn to specialized introduction services in the hope of meeting a soulmate. Today this phenomenon has assumed global proportions. The wide-ranging quest for romance has been made possible by the growing accessibility of information technology networks and international travel. While the first impression of international introduction agencies corresponds to the way the mail-order bride agencies and the consumer-husbands describe them, it does not take into consideration the point of view of women.[2] A closer look at the practices of these introduction agencies reveals multi-dimensional and interrelated inequities that place the bride in a position of dependence in relation to her consumer-husband. In this report, we shall present a feminist legal analysis focussing on the situation of the bride, and what might be done to eliminate her state of subordination. Our aim is also to provide better protection for the women involved through increased regulation.

The phenomenon of mail-order brides is becoming increasingly common in North America and Europe. It is assuming global proportions partly because of changes in gender roles in recent decades, but also because it is a lucrative and unregulated business. Indeed, to a certain extent, the phenomenon of mail-order brides is proving to be a reaction against the advances made by feminism. In looking for brides, consumer-husbands are trying to replace

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1 However, as this report attempts to demonstrate, the situation of vulnerability and subordination of the immigrant mail-order bride is fundamentally different from that of a citizen. As a citizen who is looking for a partner in the personal advertisements, "You are protected. You have some rights. You have somewhere to go. You can go to the police. It's your own language. It's your own customs. You can have the person checked out." See Christine CHUN, "The Mail-Order Bride Industry: The Perpetuation of Transnational Economic Inequalities and Stereotypes," (1996) 17 *U. Pa. J. Intern. Econ. L.* 1155, footnote p. 137 quoting Marie-Jose RAGAB of the National Organization for Women in the United States. We shall see that the situation is quite different for a mail-order bride who immigrates to Canada and gets married.

2 See especially Eddy MENG, "Mail-Order Brides: Gilded Prostitution and the Legal Response," (1994) 28 *U. Mich. J. L. Ref.* 197, pp. 216-17.

the overly demanding women in their own countries by docile and submissive wives from the Third World. Moreover, while the 20th century has seen lucrative trafficking in narcotics, weapons and money laundering, trafficking in people is a prosperous, risk-free[3] new business that is the hallmark of our era. Last, the growing economic disparity between countries of the First World and the Third World is also a factor in the acceleration of this phenomenon.

In Canadian law, there is no specific legislation governing the mail-order bride trade. In addition, the various legal transactions involved in this phenomenon fall within several different areas of Canadian law, both private and public. It raises issues relating to contract law, immigration law, marriage law, criminal law and others. In Canada, most of these matters involve the jurisdiction of both provincial and federal levels of government. Furthermore, private international law regularly enters into any legal analysis because the bride is a foreign national. In short, the mail-order bride trade in Canadian law seems inextricably caught in a maze. Through its complexities, without losing sight of our feminist approach, we shall search for the necessary measures to protect mail-order brides.

In addition, a critical analysis of the legal framework governing the practice of mail-order brides raises questions involving government immigration policy. It is important to maintain a vigilant and critical approach to the immigration policies of certain Western countries, which, under the pretext of regulating trafficking in people and protecting women, are closing their doors to the most disadvantaged people in Third World countries. We favour the prevention of trafficking in women because it is a growing and, in our view, inevitable phenomenon in an era of increased mobility, and because it has a significant effect on the lives of women. Nevertheless, we are opposed to an outright ban on the mail-order bride business. Instead, we recommend regulating the mail-order bride industry in order to provide the women involved with complete access to measures necessary for prevention and protection.

Incidentally, the control and regulation of the mail-order bride industry would allow for a greater understanding and a more precise assessment of the scope of this phenomenon for the purpose of taking appropriate measures to combat the abuses inherent in the sale and rental of human beings. An underground market resulting from a prohibition on mail-order brides would have a devastating impact in that it would simply heighten the vulnerability of women whose difficult living conditions drive them to take their chances at any cost, and would nurture unrealistic hopes inspired by dream merchants. Therefore, from our chosen perspective, we subscribe closely to one of the general objectives of the *Immigration Act*, which is "to deter those who assist in the illegal entry of persons into Canada and thereby minimize the exploitation of and risks to persons seeking to come to Canada."[4]

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3 See Maya RAGHU, "Sex Trafficking of Thai Women and the United States Asylum Law Response," (1997) 12 *Geo. Immigr. L. J.* 145, p. 160.

4 Section 2.1, *Immigration Act*, R.S.C. 1985, c. I-2 (hereinafter *Immigration Act*).

This chapter of our report, devoted to mail-order brides, is divided into two parts. Part I describes the mail-order bride trade. It contains two sections: a portrait of mail-order brides (section 1) and an examination of the unequal relationships that characterize this phenomenon (section 2). Part II analyses the legal framework that governs the mail-order bride industry. It consists of nine sections dealing with the free-market nature of the industry (section 1), contract law (section 2), immigration law (section 3), the law of marriage (section 4) and marriage breakdown (section 5), issues related to spousal violence (section 6) and procuring for the purposes of prostitution (section 7), aspects of this phenomenon not regulated by law (section 8), and the recommendation that mail-order bride agencies be regulated (section 9). Throughout this report, we include our recommendations at the end of each subsection.

PART I THE MAIL-ORDER BRIDE PHENOMENON

1 Portrait of Mail-Order Brides

The exotic and mysterious phenomenon of "mail-order brides" arouses curiosity. Moreover, many people are sceptical about its existence in Canada. The idea of men looking for wives in far-off lands is intriguing. Who are these men in search of brides? What exactly are they looking for? How do they go about it? What steps do they have to take? Who are the women who immigrate to Canada in this way? What are they looking for? The mail-order bride phenomenon raises a multitude of questions. In Part I, we shall answer these questions by painting a portrait of the "mail-order bride" phenomenon.

To flesh out this portrait, we shall explain the terminology used in this report (1.1), as well as the history of the phenomenon (1.2), provide profiles of the actors involved (1.3), and show how it works (1.4). In the last subsection, we shall describe the steps that typically lead to the meeting and then selection of a bride by her consumer-husband, before they begin the process of applying for immigration. Finally, we shall examine the various scenarios that await the bride once she enters Canada.

1.1 Terminology

The present-day mail-order bride trade necessitates the coining of an appropriate vocabulary. Accordingly, in this subsection, we shall explain what we mean by the expressions "mail-order bride" (1.1.1), "pen pal" (1.1.2), "industry," "trade" or "business"(1.1.3), and "consumer-husbands" (1.1.4).

1.1.1 "Mail-Order Brides"

In general, the English expression "mail-order bride" [MOB] is translated into French as *mariage par correspondance*. We think the expression generally used in French to describe the current phenomenon of trafficking in women poses a problem because it places the emphasis on the ultimate goal of marriage, which may or may not take place, rather than on the women who are being trafficked. In fact, a woman attempting to immigrate through this process will not necessarily achieve her objective if the man she is to marry changes his mind, keeps her under threat of not fulfilling his promise or never had the intention of getting married at all, simply wishing instead to exploit her for her services.[5] For the purposes of our report, we created the French expression *promises par correspondance* and the acronym PPC. In our view, that expression more faithfully conveys the reality we describe because it concentrates on the woman, the fiancée. Using the plural to refer to fiancées suggests the proliferation of the practice to the point that it is a real industry. The French word *promise* [betrothed], which suggests the idea of a promise, also reflects the hope for a better life by a woman who has the determination and courage to take a risk. Finally, this expression is also easily adapted to the technological changes which have allowed the transition from regular mail to e-mail as the medium used for operating this type of trafficking in women.

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[5] This is the justification for rejecting the expression "mail-order marriage" [*marriage par correspondance*], used by Status of Women Canada in its call for submissions.

1.1.2 "Pen Pals"

On the Internet, several more or less innocuous expressions refer to the MOB trade. For example, "pen pal" Web sites are used as fronts for the MOB trade.[6] "Pen pal" is an informal term for a person in a foreign country with whom another person corresponds. Through the search for foreign pen pals interested in friendship, women who would not have allowed themselves to be taken in by the more blatant practices of men looking for wives can be drawn into the MOB market. Introduction agencies use this tactic of disguising the true objectives of their clients to mislead the more naïve women. In fact, the "pen pal" Web sites are identical to the MOB Web sites. For the purposes of our report, the expression "mail-order bride" therefore includes "pen pal," as well as all the other expressions used to camouflage the real intentions of the traffickers.

Some authors have put forward the hypothesis that pen pal agencies tend to target women who are more educated and from higher social classes because they require access to a computer.[7] The technological changes of recent years have led MOB agencies to start using the services of the Internet just as diligently as the pen pal agencies. Both types of agencies offer women the assistance they require to correspond with consumer-husbands by computer. We do not think this distinction is relevant today, even if it was in the past.

1.1.3 The Mail-Order Bride "Industry" and "Trade" (or "Business")

The "mail-order bride" phenomenon has spawned a multi-million-dollar industry that markets women from Third World countries to men in the industrialized nations of the West.[8] The phenomenon may therefore be characterized as an "industry" because it gives rise to organized, large-scale economic activity.[9] It is also a "trade" or "business" because when we analyse the MOB phenomenon, we find it involves buying, selling, the exchange of goods or the sale of services.[10] In fact, as we shall see, the object of the trade is ultimately the purchase and sale of the brides themselves and their services. For the purposes of our report, we use the terms "industry" and "trade" (or "business") in analysing the MOB phenomenon.

The MOB industry has close ties with international prostitution rings as well as the tourist sex trade. However, these two lucrative types of trafficking in women are beyond the scope of our report. We shall occasionally make reference to them in order to elucidate the

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6 For example, when the government of Corazon Aquino in the Philippines enacted a law in 1990 outlawing MOB agencies, the agencies simply changed their name to "pen pal" agencies to avoid the effects of the law.

7 See Robert SCHOLES, *The Mail-Order Bride Industry and Its Impact on Legislation*, United States Immigration and Naturalization Service, 1999, p. 1.

8 See, generally, C. CHUN, *supra*, note 1, and R. SCHOLES, *idem*, p. 2.

9 *Le Petit Larousse illustré*, Paris: Éditions Larousse (1999), entry for "industrie." See also R. SCHOLES, *idem*, p. 1.

10 *Le Petit Larousse illustré, idem*, entry for "commerce."

potential ramifications of these diverse activities, without, however, presenting a legal analysis.

1.1.4 "Consumer-Husbands"

We use the expression "consumer-husband"[11] to refer to a man who uses the services of international introduction agencies. It suggests the acquisition of a wife, which is an integral part of this phenomenon for a majority of the men who engage in it. In fact, the entire MOB industry revolves around the paying customer, a man from a First World country. This man becomes a consumer of mail-order brides. For example, as we shall see, the agency offers the consumer-husband the services of a detective to verify that the bride is in good health and does not have a criminal record, and to check the veracity of her statements. Some agencies even guarantee a refund of all expenses incurred if the customer is not satisfied with the "product," i.e., the bride.[12] It therefore seems accurate to use the expression "consumer-husband" to emphasize the role of purchaser played by the man from the First World and to keep in mind the consumer product status of the bride from the Third World.

1.2 History of the Mail-Order Bride Phenomenon

For some experts, the phenomenon of mail-order brides is not new.[13] According to them, it existed for several centuries around the world, before its present proliferation through the popularization of new technologies. Those authors stress the relationship between the MOB trade and at least three historical phenomena. They link it to the *filles du Roy*, "picture brides" and arranged marriages.[14] In all three cases, brides in different historical eras crossed the oceans to take a husband.

The expression *filles du Roy* refers to the women from France sent to New France in the 17th century specifically for the purpose of having children. The name *filles du Roy* resulted from the fact that the king of France paid for their transportation and settlement in the French colony. After a two-month voyage, upon their arrival they had to find a husband among the unmarried settlers already established in the colony for several years. The *filles du Roy* could choose

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11 Some authors use the expression "consumer-husband" in English. See, for example E. MENG, *supra*, note 2. Others use the expression "client" or "consumer."

12 Marjan WIJERS and Lin LAP-CHEW, *Trafficking in Women: Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution*, Utrecht, Netherlands: Foundation Against Trafficking in Women, 1997, p. 67, citing Virginia DEL ROSARIO, "Mail-Order Brides: A Case Study of International Migration and Traffic in Women," in *International Workshop on International Migration and Traffic in Women*, Chiangmai, Thailand, October 17-18, 1994, organized by the Foundation for Women Thailand, Women's Studies Center, Chiangmai, Women and Autonomy Center, and Leiden University, 1994.

13 See E. MENG, *supra*, note 2, p. 200; C. CHUN, *supra*, note 1, p. 1157, and Mila GLODAVA and Richard ONIZUKA, *Mail-Order Brides: Women for Sale*, Fort Collins, Colorado: Alaken Inc., 1994, p. 33.

14 See E. MENG, *ibid.*, C. CHUN, *idem*, pp. 1157-59, and M. GLODAVA and R. ONIZUKA, *ibid.*

among the most eligible bachelors since there were six unmarried men for every girl who reached puberty. The life awaiting them was exceptionally harsh. However, unlike the poverty rampant in France, here their basic needs were met.[15] Thus, like mail-order brides, the *filles du Roy* immigrated to Canada through marriage to escape the poverty they faced in their own country. In addition, they did not know their husbands before choosing them upon their arrival in the colony.

The "picture bride" phenomenon emerged from the practice of arranged marriages in Japan in the early 20th century. The intended spouses exchanged photographs before their official meeting governed by custom. The practice was particularly widespread when considerable distances separated the intended couple.[16] "Picture bride books" played a fundamental role in the colonization of North America and Australia, among other places. During the early period of colonization, the dangers of crossing the ocean, coupled with the uncertainty of a foreign and unpopulated land, discouraged women from embarking on the great adventure that attracted men. As a result, the mass immigration of men to work in the gold mines and build the railways of North America, and run the sugar plantations of Hawaii, led to an imbalance between the sexes, which produced a demand for women. The colonization of Australia also resulted in a surplus of men and a shortage of women. Similarly, Irish bachelors who settled in New York City found themselves lonely. They wrote to their families in Ireland to find them a fiancée. In all these situations, the women selected on the basis of photographs were sent across the ocean to join a husband they had never seen. For some men, the "picture bride books" and the selection of a wife enabled them to ensure the continuity of their family lineage abroad, preserve the beliefs and values of their cultural group, and create a community.[17] The "picture bride" phenomenon, which involved finding wives for overseas sons, ended when the New World became more densely populated.[18] "Picture bride books" resemble the recent phenomenon of MOB catalogues and Web sites, where the bride is chosen from photographs and a description of her personal attributes. Moreover, like today's MOB Web sites, they already specialized in ethnic and cultural groups. The "picture bride books" also enabled brides to immigrate.

Like the "picture brides," the brides in traditional arranged marriages often do not know their husbands before meeting them in a foreign land, far from family and friends.[19] In traditional arranged marriages, the families select the spouses of their children. These marriages permit alliances for the sake of fortune, reputation or social class, through a marriage agreement with another family. The spouses, both men and women, often have no choice as to the person

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15 COLLETIF CLIO, *L'histoire des femmes au Québec depuis quatre siècles*, 2nd ed., Montréal: Le Jour, 1992, pp. 60-64.

16 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 33.

17 See C. CHUN, *supra*, note 1, p. 1158. The author refers to the importance, particularly for the Chinese and Japanese, of preserving their cultural values and beliefs.

18 *Idem*, p. 1159.

19 *Ibid.*

they are to marry and must comply with their family's wishes. In an immigration situation, arranged marriages enable people to preserve the culture and values of their ethnic group in a foreign country, and to participate in building a new community. The selection of the marriage partner by the families ensures a certain degree of familiarity with the social and cultural expectations of the group to which the intended spouses both belong. The MOB phenomenon differs from arranged marriage insofar as in the latter, the economic disparity between spouses is less pronounced and is often compensated for by other interests involving social class or reputation. In contrast, the MOB industry is based on the disparity between Third World and First World. In addition, a mail-order bride does not have the benefit of familiarity with and knowledge of a culture shared by both spouses in an arranged marriage, nor does she have the support of her family.[20]

We might say that the MOB phenomenon shares several characteristics with various historical practices in the colonial period, as well as with arranged marriages. However, in our opinion, the analogy between the MOB trade and those practices is faulty. In fact, unlike the MOB phenomenon, these pro-family practices allowed for marriage contracts between men and women from the same cultu[illegible]e same social group and often the same social class. In general, the spouses shared the same language and religion, a gender-based yet familiar upbringing, and membership in a similar culture.[21] Thus, while they did not know each other, they both found themselves on foreign soil yet on familiar territory. In most cases, the newcomers joined or participated in establishing a community based on their culture, which facilitated their integration, heightened their feeling of belonging and helped to alleviate the negative effects of exile. Adaptation to the host country took place within a familiar cultural community. We should also note that the bride was joining a community of immigrants who had to make their way in the New World just as she did. Finally, while in the past marriages were arranged through private initiative to ensure the survival of the family lineage abroad, today the MOB industry creates and maintains a commercial market, with one of its objectives being to make a profit.[22]

The MOB industry transforms these intracultural practices into intercultural transactions. This fundamental change means the bride is transported into a foreign environment, on a personal as well as cultural and social level. A mail-order bride marries into a situation that is alien to her language, her culture and her customs, including every aspect of her social life. Communications problems are painfully obvious. Her only point of reference for the dominant culture surrounding her is what her consumer-husband tells her.[23] The intercultural

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20 In the caselaw, there are instances where family class sponsors pursuant to the *Immigration Act*, *supra*, note 4, have claimed that the Act discriminated against the practice of arranged marriage. See *Horbas* v. *Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 359 (F.C.T.D.), in which that argument was rejected.

21 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 33.

22 See C. CHUN, *supra*, note 1, p. 1160.

23 *Idem*, p. 1183.

specificity of the MOB trade places the bride in a new situation of isolation and vulnerability. Moreover, the dynamics of colonization and participation in the creation of communities in a world constantly evolving are disappearing and giving way to a transnational MOB industry based on the immigration of brides from the Third World to the First World countries of consumer-husbands.[24] Last, as we shall see, the MOB trade is characterized by several levels of interrelated inequalities that place the bride in a position of such subordination that it seems inappropriate to associate this flourishing practice with the historical phenomena of colonization.[25]

Before moving on to a description of how the mail-order bride trade operates, it is important to draw a portrait of consumer-husbands and brides, as well as the introduction agencies which act as intermediaries, in order to get a better understanding of the expectations and objectives of the actors in this form of trafficking.

1.3 Profiles of Actors in the Mail-Order Bride Trade

The mail-order bride trade feeds on highly unrealistic and contradictory expectations about marital relationships. The consumer-husband is looking for a docile, submissive and subservient bride whom he can control and dominate. The bride, on the other hand, longs for an American of the Hollywood star variety, a good husband, a respectful, faithful and loving father. This trade is founded on the crudest of stereotypes, where the merchants of dreams, the MOB agencies, get rich at the expense of the consumer-husbands, but above all at the expense of the brides.

In this section, we draw a portrait of the actors involved in the mail-order bride industry. We attempt to build a profile of consumer-husbands (1.3.1) and the brides (1.3.2), having regard to their personal characteristics, their life stories, their motivation for participating in this practice, their expectations and their fears. We then describe the agencies that participate in the mail-order bride trade by performing introductions (1.3.3).

However, before we move on to that description, a word of warning. We had no access to empirical research analysing the mail-order bride trade in Canada. As a consequence, in order to produce some sort of profile of the actors involved, we drew on anecdotes, newspaper reports, information available on MOB Web sites, and studies, mostly American, that had examined the phenomenon.[26] We also took information from Canadian court cases, which, in their statement of facts, provided descriptions of the wives and fiancées as well as their sponsor-husbands.

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24 See E. MENG, *supra*, note 2, pp. 200-201.

25 See C. CHUN, *supra*, note 1, p. 1159.

26 The 1988 U.S. study by Davor JEDLICKA entitled *American Men in Search of Oriental Brides: A Preliminary Study Released as a Courtesy to the Survey Participants*, Texas, is often cited by authors who study the MOB industry. It has a sizeable empirical base. Its author, a sociology professor at the University of Texas, sent out 607 questionnaires to consumer-husbands looking for brides. He received 260 responses, a 44-percent response rate.

The profiles we sketch here are thus, to a certain extent, impressionistic. These profiles, derived from indirect data, allow us to explain some of the dynamics and certain characteristic traits of the social phenomenon of mail-order brides, without nevertheless claiming to paint a finished portrait.

1.3.1 Profile of Consumer-Husbands

In 1985, the Japanese American Citizen League proposed a rather unsympathetic summary portrait of consumer-husbands in search of a bride:[27]

> [The consumer-husbands are] white, much older than the brides they choose, socially alienated, experience a feeling of personal inadequacy, politically conservative, frustrated by the women's movement, and find the traditional Asian value of deference to men reassuring.

More specifically, consumer-husbands who take part in the MOB trade are middle-class and have an average annual income of about US$20,000,[28] having completed a minimum of two years of college. Some of them hold management or professional positions.[29] They are mainly white.[30] While the median age of the consumer-husbands is 37,[31] many anecdotes and the caselaw relating to spousal and fiancée visas indicate that these men are generally older. The majority, nonetheless, express the desire to have children with the bride.[32] Frequently they have been married once before,[33] have grown children[34] and have experienced a painful

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27 D. JEDLICKA, cited in M. GLODAVA and R. ONIZUKA, *supra,* note 13, p. 27.

28 See JEDLICKA, *ibid.*

29 *Ibid.*

30 *Ibid.* According to that author, 94 percent of consumer-husbands are white. Although we are primarily interested here in Canadian consumer-husbands, it is worth noting that the international MOB industry also attracts Americans, Australians, Europeans and Japanese. See also, on this subject, E. MENG, *supra,* note 2, pp. 205 and 226.

31 *Idem,* p. 26.

32 According to D. JEDLICKA, *ibid.*, 75 percent of consumer-husbands want to have children with their brides, even if they already have children from another relationship. Cited in M. GLODAVA and R. ONIZUKA, *ibid.*

33 Again, according to D. JEDLICKA , *ibid.*, 57 percent of consumer-husbands have been married once.

34 Finally, according to the same author, *ibid.*, 37 percent of consumer-husbands already have at least one child.

divorce. They have remained bitter,[35] harbouring resentment against women of their own nationality.

From the standpoint of ideas, the consumer-husbands describe themselves as ideologically and politically conservative.[36] They are distinguishable above all by their hatred and fear of the feminist movement.[37] They attribute the loss of the traditional values they hold dear to the women's movement.[38] They reject women of their own nationality as wives because they consider them to be aggressive[39] and egotistical,[40] and believe they are too ambitious professionally, make excessive demands in marriage, and have expectations of equality with their husbands.[41] They criticize the desire of women for autonomy, independence and equality. On the Internet, anti-feminist backlash is a recurring theme on MOB Web sites.[42]

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35 On this subject, see C. CHUN, *supra*, note 1, p. 1168, citing Venny VILLAPANDO, "The Business of Selling Mail-Order Brides," in Asian Women United of California, ed., *Making Waves: An Anthology of Writings By and About Asian American Women*, 1989, p. 318.

36 See D. JEDLICKA, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 25.

37 See E. MENG, *supra*, note 2, footnote 51. This author states: "These men typically view the women's movement as the reason they cannot maintain satisfactory relationships with women. . . . Promotional material for one mail-order bride catalog boasts [that] . . . 'Filipinas are more caring, loving and devoted to their husband and children, understanding, and responsible than American women. . . . They have much more concern for the family unit and are against the idea of divorce.'" The reference to the catalogue is not included. See also R. SCHOLES, *supra*, note 7, pp. 4-5, where the author explains that the anti-feminist attitude of American men looking for traditional women is shared by Taiwanese men who also look for women in Indonesia and mainland China who are different from Taiwanese women, perceived as educated, rich and demanding of their husbands. To combat this phenomenon, the government of Taiwan has imposed annual quotas limiting the number of fiancées from those countries.

38 E. MENG, *supra*, note 2, in his footnote 51, quotes the following passage from an article: "One happy customer enthused that his Filipina bride was like his grandmother's generation."

39 See especially Lisa BELKIN, "Catalogs Unite East with West in Matrimony," *New York Times*, May 11, 1986, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 29. With regard to consumer-husbands, this author states: "The men involved often say they prefer what they see as the old-fashioned submissiveness of Asian women to the aggressive independence of their Western counterparts" (*ibid.*).

40 See C. CHUN, *supra*, note 1, pp. 1176-77.

41 *Ibid.* See also Trisha FLYNN, "Mail-order Brides," *Denver Post Contemporary Magazine*, June 23, 1985, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 29. She states: "This new wave of immigrants stems neither from need nor scarcity, but from rejection. The rejection of American women — women who refuse to behave like children, servants and concubines." See also R. SCHOLES, *supra*, note 7, pp. 4-5.

42 See, for example, Donna HUGHES, *Pimps and Predators on the Internet: Globalizing the Sexual Exploitation of Women and Children*, Kingston, Rhode Island: Coalition Against

Anti-feminism provides an incentive for meeting a submissive, obedient and subordinate bride as the ideal model wife for a traditional marriage.[43] The consumer-husbands thus cling to a double misogyny. While on the one hand they are looking for a docile and submissive bride, on the other hand they harbour an inordinate fear of manipulative women who only want to mislead them and use them for the purpose of immigrating, and who lack sincerity in their efforts to wed. For example, a consumer-husband who says he is very satisfied with his bride feeds those fears by posting information on the Internet to warn potential consumer-husbands against being cheated by unscrupulous and desperate brides.[44]

The consumer-husbands praise traditional family values based on the division of labour, respect for the man as head of the family, and the woman's role as wife and mother. In their

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Trafficking in Women, 1999, p. 39, who states: "The women advertised on the Internet are 'known to be pleasers and not competitors. They are feminine, NOT feminist!'"

[43] See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 31, citing a passage from the account of a consumer-husband published in Patti THORN, "Colorado's Mail-order Matchmaker," *Rocky Mountain News Sunday Magazine*, September 2, 1984: "Someone who puts me first in all things; my needs come before anything else. A nice little wife. She does everything in the house, that's it. She's my wife and not working for someone else. I think a lot of divorces are caused because the wife works. When both work, the roles get mixed up. I love Evelyn the way she is. If she got a job as a bank teller downtown and did the typical after work activities, going for a few drinks with the ladies, and then starts comparing notes, she could be easily influenced and become a real women's libber. And that's a danger. I feel sort of threatened by that sort of thing. As long as she stays the way she is and doesn't become crazy, we'll have a good marriage."

[44] See, for example, Gary CLARK, "Common 'Mail-Order Bride' Scams," available on the Web site: http://www.planet-love.com/gclark/ (accessed on June 20, 2000). A few passages from that text illustrate the kind of advice that consumer-husbands are "consuming" on this subject: "*Most scams involve money.* There are a lot of scams out there, but *almost all of them involve you sending her money.* Don't do it! . . . Remember, any time a woman asks you for money you should refuse, without exception. If she's so poor that she needs your help just to carry on the letter writing with you then she's also so poor that not only she but her entire extended family will probably become a constant source of financial drain . . . assuming you and her do wind up getting married. . . . *Beware of the victim scam. Be careful of any woman who portrays herself as a victim of any kind.* These are the ones to simply drop. Many scam artists will portray themselves as a victim to divert your suspicion from the scam. Whether or not she's really a victim isn't important. You don't need the burden of this kind of person, so get rid of them. *Avoid women who are too eager. Be suspicious if you're an ordinary guy and any woman who seems to be out of your league starts to come on strong. . . . Most con artists are very clever.* Don't assume that, just because the person you are corresponding with never openly asks you for money (or any other kind of favor) that she's not a con artist. Some of the cleverest ones can find ways to get you to send them money without ever asking for it. . . . *The 'other man' scam. . . . Test her sincerity. . . . My advice is never have the woman visit you first. Always plan to go and see her first.*" Gary Clark is also the author of a book entitled *Your bride is in the mail!* ISBN 0-9641738-3-2, 1999.

marital relationships, their insecurity[45] leads to a need for control and power over their wives.[46] They are looking for domestic and sexual services[47] supplied by young, poorly educated brides whom they can keep under control,[48] rather than pursuing love and a stable relationship.[49] The consumer-husbands spend large amounts of money to obtain their brides. In return, they expect services commensurate with the price paid.[50] Some of them even boast about having "bought" brides because they cost less than the services of prostitutes.[51] What is more, the consumer-husbands hope to receive the gratitude of the brides as their saviours who enabled them to immigrate to their country and took them out of their misery.[52]

Although we do not have any cases relating directly to mail-order brides, the caselaw with regard to fiancée and spousal visas confirms this less than flattering image of embittered and

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45 See John KRICH, "Here Comes the Bride: The Blossoming Business of Imported Love," *Mother Jones,* February/March 1986, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 26, who describes consumer-husbands as follows: "[The men] want a refuge from the chaos; all of them speak of wanting someone 'who'll be there every night' as one put it, 'who won't cheat, and who I can trust to do right by me — even down to how she takes care of the dog.'"

46 The authors M. GLODAVA and R. ONIZUKA make the following comment regarding the personality profile of consumer-husbands: "A profile of men who are satisfied so long as they have control and power over their foreign spouses, and who do not really desire a 'loving and enduring relationship'," *idem*, p. 29.

47 One author summed up the comments made by several consumer-husbands by stating that they were looking for a cook, housekeeper and sexual partner: E. MENG, *supra*, note 2, p. 207. On this point, see also Elaine KIM, "Sex Tourism in Asia: A Reflection of Political and Economic Inequality. Critical Perspectives of Third World America," Vol. 2, No. 1, fall 1984, cited in M. GLODAVA and R. ONIZUKA, *ibid.* Kim writes with regard to consumer-husbands: "They hate and fear women's liberation because they want a sexual and domestic servant, a woman totally dependent upon them. What many of the Western subscribers to mail-order marriage catalogues hope to find is eagerness to serve and grateful devotion, qualities they know are easier to come by in a very young woman from a poor country. Such a woman would be humble, and grateful to the man who has rescued her from poverty and given her an opportunity to live in Western Europe or America."

48 See R. SCHOLES, *supra*, note 7, p. 4.

49 *Ibid.*

50 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 18.

51 E. MENG, *supra*, note 2, p. 223.

52 See E. KIM, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 47: "According to one American married to a much younger woman from a rural area of the Philippines, she 'should thank God everyday that someone took her out of that place she used to live.' She should be appreciative."

suspicious men[53] looking for an undemanding, submissive, docile and "domesticated" wife. For example, some sponsors distrust women from their own country who are only after their money.[54] The experience of a painful divorce makes the men more distrustful in their search for a new wife.[55] Furthermore, some authors observe that more and more consumer-husbands are using the MOB trade to fill their need for personal care, due to either chronic health problems or old age.[56] In that case, the bride, more an employee than a spouse, plays the role of nurse.[57]

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53 In *Horbas* v. *Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D. No. 884 (Immigration and Refugee Board of Canada, Immigration Appeal Division) (Q.L.), the Immigration and Refugee Board gave the following description of the sponsor of a 32-year-old fiancée: "The appellant is a 57-year old citizen of Canada. He was previously married. He divorced in 1984. He has three grown-up children from that marriage. The divorce between the appellant and his ex-wife was a bitter one. His ex-wife obtained custody of their daughter, while their two sons remained with the appellant. The appellant lives on a farm in Fort Saskatchewan, Alberta. He has three and a half acres of land where he grows vegetables. He is a process operator by trade, works shift work and earns approximately $55,000 per annum. He has an 11-year old foster child, called Dayton, who has been with the appellant since the child was five years old. The appellant stated that he agreed to become a foster parent because Dayton had been moved from foster home to foster home. After his children left, the appellant continued to live on the farm. . . . The appellant testified that he is a shy and reserved individual. After the break-up of his marriage he made no efforts to form new relationships with women. He continues to have some contact with his children and ex-wife."

54 See *Law* v. *Canada (Minister of Citizenship and Immigration)*, [1999] I.A.D.D. No. 322 (Immigration and Refugee Board of Canada, Immigration Appeal Division) (Q.L.), where the wife's visa application was rejected because the visa officer concluded that the marriage was a marriage of convenience. The consumer-husband was looking for a bride in China because women in Canada wanted to marry him for his money.

55 See *Le* v. *Canada (Minister of Citizenship and Immigration)*, [1999] I.A.D.D. No. 1017 (Immigration and Refugee Board of Canada, Immigration Appeal Division) (Q.L.). The husband testified about how careful he was about marriage: "He has become more cautious when it comes to having relationships with women, because he has previously been married, but divorced in 1991."

56 See C. CHUN, *supra*, note 1, footnote 154, in which she cites sources stating that feminist movements in the Philippines denounce the MOB trade because many women become nurses to elderly men in Europe, Australia and other countries. See also E. KIM, cited in M. GLODAVA and R. ONIZUKA, *supra*, note 47, who states: "Since Westerners who seek Asian wives are predominantly aging men, it stands to reason that some of them are looking for nursemaids."

57 In 1985, the Federal Court confirmed this role played by the brides in an immigration case, in *Horbas* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 20. In that case, the visa officer refused to issue a spousal visa to Mrs. Horbas because, in his opinion, it was a marriage of convenience. Among the factors that he considered in deciding to reject the application, the officer included the following facts: "At your interview on December 7, you stated that your husband is in good health. Yet, in a letter to this office dated October 8, 1984,

1.3.2 Profile of Brides

It is easier to draw a profile of the brides than of the consumer-husbands since the Web sites contain a wealth of personal information about them. However, the brides are not a homogeneous group. Consequently, we shall present a range of common characteristics and underline certain significant distinctions.[58]

MOB agencies distinguish between brides from different parts of the world: Asia, South America, Eastern Europe and Africa. Political instability and economic crises on all those continents affect the people living there, particularly women.[59] All over the world, women are the first casualties of economies in trouble since, in most countries, education, training and property ownership are inaccessible to them, if not prohibited.[60] These second-class citizens are therefore the first to suffer the effects of economic and political crises. Even so, the general factors leading brides to get involved in the MOB trade differ from place to place. Brides from certain countries in Asia, such as the Philippines, emigrate because of deep poverty, malnutrition, high unemployment and the heavy foreign debt.[61] On the other hand, the general chaos, deteriorating living conditions, and uncertainty about the future cause numerous brides from countries in Eastern Europe and the former Soviet Union to set out for the First World. Moreover, the marketing of these brides by agencies became possible only with the end of the Cold War and the lifting of restrictions on travel and living abroad, as well as the liberalization of immigration rules.[62]

The brides vary in age and education. The Web sites offer brides who range in age from 15 to 52.[63] Here also, we must distinguish between brides of different origins. In fact, the average

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your husband advised that he is a 'disabled' person and requires your 'assistance.' . . . When questioned about your feelings for Mr. Horbas, you stated that he was kind and helpful. I am of the opinion that your actions, feelings and motives are more appropriate to a relationship with a benevolent employer than to a lasting marital union."

58 See Lin Lean LIM, *Flexible Labour Markets in a Globalizing World: The Implications for International Female Migration*, Geneva: International Labour Office, 1997, p. 3 (copy obtained from the author in March 2000). Lim stresses the importance of distinguishing between various types of trafficking in women and female workers, according to their country of origin.

59 See D. HUGHES, *supra*, note 42, p. 40.

60 See also E. MENG, *supra*, note 2, p. 203, and M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 40.

61 See C. CHUN, *supra*, note 1, p. 1171; E. MENG, *ibid.*; and John KRICH, "Here Comes the Bride: The Blossoming Business of Imported Love," *Mother Jones*, February/March 1986, quoted in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 55: "horrendous unemployment, a working familiarity of American culture, widespread schooling in English, a dash of colonial mentality, just enough prosperity to elicit a craving for more, Catholicism, family-oriented mores breaking down in the face of economic chaos."

62 See C. CHUN, *idem*, p. 1173.

age of brides from Asia is much lower than that of brides from Eastern Europe.[64] As a result, their educational levels also vary, with women from Eastern Europe being generally more educated than their Asian counterparts. However, women of all educational levels take their chances at becoming mail-order brides.[65]

Mail-order brides are often religious. Consequently, in the majority of cases, they will exert every effort to avoid the failure of their marriage and the humiliation flowing from divorce. Several embrace the traditional values of family, fidelity and devotion.[66] In this connection, the MOB agencies exploit stereotypes of the brides based on their place of origin. For example, MOB Web sites praise the merits of Russian women, who are traditional and eager to please.[67] On the other hand, Asian women are associated with "china dolls": submissive, silent, obedient and devoted to their men. They are also depicted as exotic and erotic.[68]

We should also note that the brides tend to mistrust the legal system and therefore are not inclined to use it to assert their rights because of their experience with corruption, dictatorship, and the non-litigious approach in their countries of origin.

One of the reasons brides decide to enter the MOB market is to try to improve their living conditions.[69] North American prosperity is a great attraction for women who have the courage to give themselves a fresh start.[70] In fact, the brides experience serious difficulties meeting their basic needs in their countries of origin. At best, they are trying to provide for their own needs so as not to become a burden on their families. At worst, they are supporting their families. In such circumstances, marriage to a prosperous consumer-husband in a First World country is one way of guaranteeing the survival of their families.[71] Indeed, after immigrating to Canada,

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63 See in particular M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 32; D. HUGHES, *supra*, note 42, p. 40; and E. MENG, *supra*, note 2, footnote 31.

64 See R. SCHOLES, *supra*, note 7, p. 3, who, after examining MOB catalogues, concluded that 31 percent of women from the former Soviet Union were under 25 years of age, as opposed to 61 percent of Asian women.

65 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 32.

66 *Idem*, pp. 55-56.

67 See C. CHUN, *supra*, note 1, p. 1177.

68 *Ibid.*

69 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 37, as well as R. SCHOLES, *supra*, note 7, p. 3.

70 M. GLODAVA and R. ONIZUKA, *ibid.*

71 See E. MENG, *supra*, note 2, pp. 203-204.

they send money home to their close relatives and then enable them to immigrate by sponsoring them.

While one of the factors leading to their participation in the MOB trade is economic necessity, the brides themselves speak differently about their personal motivations. Romantic thoughts seems to be a characteristic common to many brides. They say that they are attracted to American men who resemble movie stars: tall, white and blue-eyed.[72] Like the consumer-husbands who reject women of their own nationality, Philippine, Thai or Russian women complain about the men in their countries. Instead, they idealize the American man as a father and husband. From him they expect love, attention, a sense of responsibility, fidelity and sincerity.[73] Web sites are careful to reassure consumer-husbands that the brides are not concerned about the age, appearance or health of the men they are seeking.[74] In short, the brides "see American males as their 'Knights in shining armor' who will snatch them away from their life of poverty and oppression."[75] While the allure of the American myths portrayed in Hollywood films is a partial motivation for this search for marital relations based on love and romance, the unequal relationships between men and women in the women's countries of origin also provide part of the explanation.

Finally, several personal accounts suggest that it is not the bride herself who seeks out the services of MOB agencies. Some brides explain that friends, family members or mere acquaintances gave their photograph to the agency with their consent or without informing them.[76] Only after receiving letters, followed by gifts, do they begin to envisage the possibility of immigrating to a Western country. It may be that some of these personal accounts reflect the woman's need not to acknowledge that she is the one responsible for her fate. Thus, her passive posture makes it easier for her to save face, since someone else initiated her involvement. However, it is even more probable that the aggressive actions of agencies in search of women to offer to their clients encourage the brides to supply them with new names, with or without financial reward. The documents available to us do not enable us to establish the exact nature of the actions of the MOB agencies.

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72 *Idem.* See footnote 44, where the author discusses the American colonization of the Asian psyche.

73 See R. SCHOLES, *supra*, note 7, p. 3. See also M. GLODAVA and R. ONIZUKA, *supra*, note 13, pp. 37-38, where the authors quote the following passage from *USA Today* in 1986: "Many Malaysian men don't know how to treat women. . . . After they get married they treat you bad. . . . With an Asian man I would just be a wife. But with my American husband, I am a wife, lover, friend, companion." See also E. MENG, *supra*, note 2, footnote 44.

74 See D. HUGHES, *supra*, note 42, p. 44.

75 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 50.

76 See C. CHUN, *supra*, note 1, footnote 35; M. GLODAVA and R. ONIZUKA, *idem*, pp. 19-20.

1.3.3 Profile of Agencies

We have very little information about the multitude of MOB introduction agencies inundating today's Internet. Only one study, done in 1994, attempts to describe the people operating these agencies and to understand their motivations.[77]

At the risk of repeating ourselves, we must point out that the surge in use of the Internet in the last five years has transformed the MOB industry. A few figures suffice to illustrate the phenomenal proliferation of this industry.[78] In 1994, Mila Glodava and Richard Onizuka estimated at 100 the number of agencies and organizations involved in the MOB trade.[79] In mid-March 1998, Robert Scholes counted 153 of them, and two months later, 202 on the parent Web site "goodwife.com."[80] In June of 2000, we identified 340 on the same parent Web site.[81] It should be noted, however, that there were also some 233 MOB sites listed on the parent Web site "planet-love.com,"[82] not to mention the countless other Web sites we undoubtedly failed to find. Some agencies manage a variety of Web sites, and several identical sites operate under different names, offering essentially the same descriptions of brides. It is therefore difficult to calculate even an approximate number of MOB agencies.

Furthermore, widespread use of the Internet makes it increasingly difficult to identify the real people behind these agencies. An Internet address does not indicate the country where the agency is operating. In addition, the postal address posted on the site is often fictitious. The difficulty of identification creates legal problems in terms of determining the applicable law, the competence of national courts, as well as the place where the legal relationships arising out of the various transactions involved in the MOB trade are formed. It makes legal action futile, or at least complicates access to the legal system.

According to Mila Glodava and Richard Onizuka, the three main MOB agencies operate from Hawaii and California,[83] and the majority of MOB agencies were founded by people

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77 See M. GLODAVA and R. ONIZUKA, *idem*, pp. 8-24.

78 See R. SCHOLES, *supra*, note 7, p. 2.

79 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 8. The authors mention certain estimates giving 1,000 as the number of organizations in the United States, Canada, Europe and Australia involved in the mail-order bride industry in 1994.

80 R. SCHOLES, *supra*, note 7, p. 2. See also D. HUGHES, *supra*, note 42, p. 42.

81 See http://www.goodwife.com (accessed on June 6, 2000).

82 See http://www.planet-love.com (accessed on June 6, 2000).

83 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 8. The three principal agencies in 1994 were "Rainbow Ridge Consultants" (formerly "Cherry Blossoms"), "American Asian Worldwide Services" (AAWS) and "Asian Experience."

who themselves had been involved in this type of marriage.[84] Among other stories, they tell of the creation of "Asian Experience" by a married couple where the consumer-husband was 49 years old when he started to correspond with the girl (then 15 years old) who became his wife.[85] The motivation for starting up this MOB business seems to have been the desire "to help available bachelors who are tired of being alone look for a faithful, devoted, unspoiled, and loving Asian wife."[86] However, in recent years profit has undoubtedly become a motivation for starting up new MOB agencies.

In terms of ideology, MOB agencies share the conservatism of the consumer-husbands in that they support traditional family values. The agencies also play on the crudest possible stereotypes to sell their "products." They appear to be sympathetic to men fed up with the women's movement. They praise the merits of foreign women who combine the roles of sex partner and domestic worker.[87] They spice up their descriptions with the submissive and exotic aspects of faraway women. On the other hand, these same agencies are selling the romance of a marriage between brides and handsome Hollywood-type men, who are loving husbands and good fathers.

The MOB agencies offer their consumer-husband subscribers a variety of services to assist them in meeting brides. In the next subsection, we shall analyse those services as well as the process that awaits the participants in this phenomenon.

1.4 How the Mail-Order Bride Trade Operates

The modus operandi of the MOB trade remains largely unknown. Thus, we shall describe here, in chronological order, the typical steps the consumer-husbands and brides will go through before submitting their immigration applications for landed immigrant status in Canada for the wife or fiancée. We shall outline the stages of the introduction period leading to the selection of a bride by the consumer-husband. First, we shall explain our methodology (1.4.1), i.e., the various sources we used to create the most accurate possible picture of the introduction to and selection of a bride. We then explain the various aspects of the mail-order bride trade. To that end, we examine catalogues and Internet sites (1.4.2), correspondence (1.4.3), organized prenuptial travel (1.4.4), the services offered by the agencies (1.4.5), and the costs and profits involved in this trade (1.4.6). We end by describing the process that begins after the bride is selected (1.4.7), and the possible scenarios awaiting the brides after they arrive in Canada (1.4.8).

1.4.1 Methodology

It is very difficult to obtain accurate data about the mail-order bride industry in Canada. The absence of empirical studies and statistics on the subject prevents us from finding out how many women, or how many consumer-husbands, are involved in this international trade. As

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84 *Idem*, pp. 9-11.

85 *Ibid.*

86 *Ibid.*

87 See E. MENG, *supra*, note 2, p. 206.

we saw earlier, we also cannot determine the number or identity of the MOB agencies, the traffickers and the intermediaries who participate in the industry, or the amounts of money generated by this trafficking. At present, the industry has evolved within the context of a free market in the absence of Canadian regulation. It is evolving into an almost clandestine trade. Yet, despite the lack of statistics, all the documentation shows that this phenomenon has skyrocketed in the last decade. Like other First World countries, Canada is one of the most desirable immigration destinations for the promoters of the MOB trade.

The number of women who immigrate to Canada every year through the mail-order bride trade remains inaccessible. Also, to our knowledge there has been no Canadian study directly on this subject. In addition, statistics relating to spousal and fiancée visas do not make any distinctions between Canadian citizens or permanent residents, and their wives and brides, on the basis of the process by which they first met.

We have access only to secondary documentary sources, since our study is not intended to be empirical. In order to create a succinct portrait of the workings of the MOB trade, we used the testimony of brides as well as those who have worked with them, such as social workers or counsellors. We have also taken information from studies on the subject. However, since the MOB industry is expanding so rapidly, much of the data in studies completed in the early 1990s are already out of date. Indeed, the expansion of information technology, the Internet and e-mail has transformed MOB business practices significantly by replacing or supplementing the catalogue system. Finally, we also obtained information from Canadian court decisions to determine what evidence the immigration authorities take into consideration. Thus, the following description of MOB business practices is impressionistic, but necessary, in order to understand the real issues involved in this type of trafficking in women.

RECOMMENDATION

1. **We recommend that the federal government continue to fund empirical studies of the mail-order bride trade in Canada. The purpose of such studies should be to identify, *inter alia*, the number of women involved in this international trade, the number of consumer-husbands, the identity and number of MOB agencies, the fees they charge, and the profits they generate.**

1.4.2 Catalogues and Web Sites

Prior to the advent of the Internet, MOB agencies operated by distributing catalogues describing the brides, reproducing their photographs and supplying their addresses for a fee, depending on the number ordered by a consumer-husband.[88] The catalogues were advertised

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[88] Our report concerns women "marketed" for the purposes of the MOB trade. However, it is important to note that there are catalogues advertising single men. In the course of our research, we identified only one instance of catalogues intended for women. These catalogues describe men living and working in Alaska, where there is a shortage of women. Like the "picture bride books," these catalogues are designed to promote the immigration of women to Alaska. They seem to be aimed essentially at American women who would agree to change their lives and go

in periodicals such as *Car and Driver*, *Stereo Review*, *Rolling Stone* and a number of other men's magazines, including pornographic magazines such as *Penthouse.*[89] Today, the MOB trade essentially operates through the Internet.

The Internet offers several advantages. It can reach huge numbers of potential consumer-husbands at very little cost. Frequent updating of information, the distribution of greater quantities of information, and the transmission of high-quality images and sound at low cost make it more attractive than the catalogues.[90] Web sites are also more efficient than the catalogues because access to data banks means that brides can be selected on a "made to measure" basis, to suit the wishes of the consumer-husbands.

Individual MOB Web sites exist on the Internet. Nevertheless, in order to increase their visibility and advertise more effectively, parent Web sites host a large number of sites specializing in mail-order brides. For example, the Web site "goodwife.com" lists 340 MOB sites.[91] That site, like other parent sites,[92] is subdivided into four major groups, based on the ethnic origins of the brides: 97 sites for Asian brides, 54 sites for Latin brides, 150 sites for Soviet brides and 39 multi-ethnic sites.[93]

Using ethnic categories, MOB Web sites encourage the consumer-husband to preselect a bride according to his preferences, without confronting him with his racial prejudices with regard to other groups. MOB Web sites also exploit the most disagreeable stereotypes to promote their "merchandise" to the consumer-husbands. The names of the Internet sites themselves illustrate the cultural clichés that characterize the MOB industry. For example, Web sites for agencies specializing in Asian brides call themselves "Cherry Blossoms," "Siam Lady," "Exotic Asian Women," "China Doll," "Exotic Orchid" and "Pearls of the Orient," in order to emphasize the exotic aspect of these women. On the other hand, MOB agencies devoted to East European women emphasize the European aspect of the brides they "offer," and have names such as "East Meets West," "Club Natalia," "Euro Girl," "Savva La Belle," "Siberia Princess," "Kirov Classic Love" and "Amour Bulgaria." The multi-ethnic sites are just as suggestive and stereotyped, with names such as "African Princess," "Cuban

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to live in Alaska. The women already have U.S. citizenship, are familiar with the culture and know their rights, which is not the case for the mail-order brides who concern us here. See Melinda HENNEBERGER, "Well, the Ukraine Girls Really Knock Them Out," *New York Times*, Sunday, November 15, 1992, p. E-6.

89 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 11, and E. MENG, *supra*, note 2, p. 206.

90 See generally D. HUGHES, *supra*, note 42, pp. 40-41, and C. CHUN, *supra*, note 1, p. 1163.

91 See http://www.goodwife.com (accessed on June 6, 2000).

92 *Ibid.*

93 *Ibid.*

Affairs" and "Latin Treasures."[94] In addition, the Web sites target specific clients. For example, MOB agencies "offering" brides from Africa, such as "Ebony Gems of Nubia" and "African Queens," are aimed at "Afro-occidental" professional men.[95]

MOB ads targeting consumer-husbands resemble personal ads for singles in newspapers or on the Internet, but they provide more information. Every bride "offered" on the site is given a number.[96] The bride introduces herself by her given name and mentions her age, a few physical characteristics, such as her eye colour, some distinguishing personality traits, as well as her qualifications and interests. Her description generally includes at least one photograph of her face, and often a full-length photograph. She concludes her ad by expressing her wishes as to the type of man she is looking for, with a short description of the qualities she would like to find in him.

Several Web sites at the outset require the consumer-husband to give the maximum and minimum age, height and weight of the bride he is seeking. This practice contributes to the impression that the women are being reduced to consumer products whose characteristics can be chosen in the hope of finding one made to measure.[97] Numerous Web sites also include the bride's measurements, i.e., the size of her bust, waist and hips.[98] Some agencies ask the brides to fill out questionnaires relating to intimate aspects of their lives that border on voyeurism. For example, the questionnaire used by the "American Asian Worldwide Service" asks the following questions:[99]

> "Do you wear make-up?" "Which underwear do you like to wear?" "Have you experienced pre-marital sex?" Another queries whether a candidate has "physical defects or has flat, medium or full breasts," and proceeds to ask, "What kind of lover are you? Affectionate, shy and submissive, passionate, inhibited, uninhibited[?]"

An interested consumer-husband will subscribe either to the site or to the catalogue. In general, he may choose to pay a single amount for each bride address he wants or a lump sum for a predetermined number of addresses, or he can take out a subscription for a period of six months, one year or more.[100] For additional fees, the agency offers him other services.

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94 *Ibid.*

95 See D. HUGHES, *supra*, note 42, p. 42.

96 See C. CHUN, *supra*, note 1, p. 1164.

97 *Idem*, p. 1162.

98 See D. HUGHES, *supra*, note 42, p. 41 for a description of the brides.

99 See E. MENG, *supra*, note 2, p. 202, who cites various sources.

100 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, pp. 15-16. See G. CLARK, *supra*, note 44.

For example, the agency will place a personal ad about the consumer-husband in major newspapers in the countries where he wants to find a wife.[101] Some agencies also sell or rent videos of the brides they advertise.[102]

The adventure begins when the consumer-husband subscribes to a service allowing him to select the women with whom he wishes to correspond.

1.4.3 Correspondence

The consumer-husband "courts" several brides.[103] First, he selects women who conform to his requirements, and then he writes to a number of them. So too, the brides correspond with several consumer-husbands. The cost of the letters and translations may become prohibitive. Therefore, when the content of the letters becomes more serious, the players select the four or five most promising people, and then choose the one who seems most compatible. According to the study by Glodava and Onizuka, the correspondence between the bride and the consumer-husband continues for 3 to 14 months before they decide to marry.[104] In cyberspace, that period is undoubtedly shorter because of the instantaneous nature of e-mail.

During the "courtship" period, the consumer-husband generally sends the bride a few presents, such as money, flowers, necklaces, watches and brassieres.[105] He also communicates with her by telephone.[106]

During the immigration process, correspondence, gifts and telephone bills are provided as evidence of the existence of a genuine relationship between the consumer-husband and the bride.[107]

1.4.4 Organized Prenuptial Trips

The MOB agency recommends that the consumer-husband meet the bride in her country. The agency will invite him to take part in a prenuptial trip, depending on his financial resources. It generally offers two types of trips.

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101 On this subject, see M. GLODAVA and R. ONIZUKA, *idem*, p. 17.

102 *Ibid.*

103 See E. MENG, *supra*, note 2, p. 208.

104 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, pp. 17-18.

105 See E. MENG, *supra*, note 2, p. 208.

106 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 18.

107 See, for example, *Law* v. *Canada (Minister of Citizenship and Immigration) supra*, note 54; *Le* v. *Canada (Minister of Citizenship and Immigration), supra*, note 55; and *Horbal* v. *Canada (Minister of Citizenship and Immigration) supra*, note 53.

First, the consumer-husband can decide to go and meet his bride and her family. The agency then assists him with planning and provides him with information about marriage customs and immigration procedures. That visit often leads to an engagement or a quick marriage.[108]

Second, the consumer-husband can take part in a "bridal tour," which consists of going to a Third World country to meet women ready to marry. The circuits organized by MOB agencies generally involve a competition among the women to find a husband.[109] These organized prenuptial trips belong in the category of sex tourism.

During the immigration process, evidence of the consumer-husband's stay in the bride's country, photographs of the engagement or wedding ceremony, as well as bills for the festivities are also provided as evidence to persuade immigration officers that the couple's relationship is genuine.[110]

1.4.5 Services Offered by the Agencies

In addition to promoting meetings between brides and consumer-husbands, MOB agencies supply a variety of services to the consumer-husband, including letter-writing, translation, interpreters, flower delivery, and advice about the customs and traditions of the bride's country,[111] immigration procedures and visas.[112] They also offer the services of travel agents to make arrangements for the consumer-husband's trips, and tour guides while the consumer-husband visits the bride's country.[113]

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108 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 18.

109 See E. MENG, *supra*, note 2, p. 209 and footnote 82, as well as C. CHUN, *supra*, note 1, p. 1160.

110 See, for example, *Law* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 54; *Le* v. *Canada (Minister of Citizenship and Immigration)* *supra*, note 55; *Horbal* v. *Canada (Minister of Citizenship and Immigration)* *supra*, note 53.

111 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 16; C. CHUN, *supra*, note 1, p. 1184.

112 Since 1996, the agencies operating from the United States have been required to disclose information to the brides about U.S. immigration law and procedures (s. 652, *Immigration Reform and Immigrant Responsibility Act*, Pub. L. No. 104-208, 110 Stat. 3009 (1996)). For example, MOB agency Web sites offer the services of translators and immigration experts. See, *inter alia*, the two Canadian MOB Web sites we have identified: http://www.indiacanadamarriage.com and http://www.westcoast.com. These two sites do not offer services or information relating to Canadian immigration procedures.

113 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 19; C. CHUN, *supra*, note 1, pp. 1164-65.

The agencies also provide the consumer-husband with the services of private detectives, doctors and psychologists for assessing a potential bride.[114] Such services are designed to ensure that the bride is in good mental and physical health, has no criminal record, and is telling the truth. While the MOB agency cautions the consumer-husband to be discreet when it comes to revealing himself, it suggests that the bride reveal herself completely. On the other hand, the consumer-husband is not subjected to any investigation. Thus the bride has no way of finding out whether he has a criminal record or knowing anything about his family background, such as incidents of domestic violence, or of checking the veracity of his statements about his living conditions and income in Canada. This situation can have serious repercussions since the bride is leaving her country, family and culture to immigrate into a situation that she has no way of foreseeing.

1.4.6 Costs and Profits

The enormous costs and profits involved in the MOB trade are difficult to estimate. The costs affect the consumer-husbands and sometimes the brides. Furthermore, fees for obtaining visas and permanent residence must be taken into account. The MOB industry also earns profits for the intermediaries.

The costs to a consumer-husband of a mail-order bride are generally high, making the industry lucrative for the intermediaries. The costs include catalogues, subscriptions, addresses, videos, newspaper ads in the brides' countries, correspondence, long-distance telephone calls, presents for the bride and her family, the services of translators, interpreters, and detectives, one or more trips to the bride's country, engagement and wedding celebrations, as well as the costs of immigration. In 1994, Glodava and Onizuka estimated that a consumer-husband would pay out between US$10,000 and US$15,000 for a bride.[115]

In addition, after choosing his bride, the consumer-husband must pay the fees associated with immigration procedures, in particular the fees for the spousal or fiancée visa and permanent residence. For example, the fee for a permanent residence application by a spouse or fiancée coming to Canada is $500.[116] He will also usually have to pay his bride's travel expenses to Canada.

MOB agencies sometimes require brides to pay a fee for finding them a husband from the First World.[117]

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114 See C. CHUN, *idem*, p. 1184.

115 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 18, and C. CHUN, *idem*, p. 1166, who estimates the amount the consumer-husband pays to "purchase" a bride to be between US$3,000 and US$10,000.

116 Section 3, *Immigration Act Fees Regulations*, SOR/97-22, Schedule 1, (1997) 131 Gaz. Can. II. 152.

117 See especially E. MENG, *supra*, note 2, footnote 56, and M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 19.

We have seen how MOB agencies have proliferated in the age of the Internet. Their profits continue to grow. For example, in 1994, the gross annual income reported by the California MOB agency "American Asian Worldwide Services" was US$250,000, while "Rainbow Ridge" reported US$400,000.[118] The growing number of agencies prompted one expert to describe it as a multi-million-dollar industry.[119]

1.4.7 Steps After a Bride is Chosen

The objective of our report is to analyse the legal framework governing the MOB industry from the time the women first try to obtain landed immigrant status in Canada. Once the choice of bride has been made, there are two possible scenarios. First, the marriage will take place in the bride's country (1.4.7.1). If not, the bride will immigrate to Canada on a fiancée visa, in which case her marriage to the consumer-husband must take place within 90 days of her arrival (1.4.7.2). We shall also briefly describe the various scenarios that await the bride after she enters Canada (1.4.8).

1.4.7.1 Marriage in the bride's country

We have seen that sometimes the consumer-husband decides to marry the bride while on a visit to her country. Following a wedding in a foreign country, he returns to Canada alone. He must then initiate the immigration process, which includes applying for immigration by the bride as a member of the family class, obtaining a spousal visa and providing an undertaking of sponsorship. This procedure raises the issue of the validity of foreign marriages. If the application of the bride, now the wife, is accepted, she is given a spousal visa granting her permanent residence status in Canada. She may then join her consumer-husband in Canada.

1.4.7.2 Marriage in Canada

On the other hand, the consumer-husband may decide to marry the bride in Canada. He must then begin the immigration process, which requires that the bride obtain a fiancée visa and that the consumer-husband submit a sponsorship undertaking. The fiancée visa is conditional upon their marriage within 90 days from her entry into Canada, and upon her providing proof to the immigration authorities that this condition was fulfilled. During the 90-day period, some consumer-husbands demand that their brides have sexual relations with them without marrying them.[120] The 90-day period serves, in essence, as a trial period, where the fate of the bride depends on the good will of her consumer-husband, who may or may not decide to marry her. With a fiancée visa, the bride is given permanent resident status. If the two conditions are not met within the time limit, however, she loses that status, becomes an illegal immigrant and must return to her country of origin.

1.4.8 The Bride's Situation Once in Canada

Several possible scenarios await the bride once she arrives in Canada.

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118 E. MENG, *idem*, p. 201.

119 C. CHUN, *supra*, note 1, p. 1155.

120 E. MENG, *supra*, note 2, p. 209.

First, she may find that she has a satisfying marital relationship with her consumer-husband. In such a relationship, love is an important element.[121] Nevertheless, in most cases, a relationship of subjugation keeps the woman under the power of her consumer-husband. In fact, often he tries hard to keep his bride in a state of dependence and vulnerability. For example, she does not know how to drive, she does not participate in activities such as running errands or shopping, and she has no money.[122] This state of dependence may go so far as to force her to stay in the marriage even when the relationship is abusive. Indeed, her linguistic and cultural isolation, lack of a social network, economic dependence, religious beliefs, cultural constraints and, above all, fear of deportation are all factors causing her stay in the relationship with the consumer-husband at any cost.[123] The stigma attached to a failed marriage encourages the bride to keep secret the problems she is experiencing in her marriage.[124] In some cases, this exercise of control leads to spousal violence.[125]

In the worst-case scenario, the consumer-husband is a pimp who takes away the bride's passport and forces her into prostitution.[126] Where the bride has a fiancée visa, she can quickly lose her permanent resident status for failing to comply with the requirement that she marry within 90 days of entering Canada, and she becomes illegal. The pimp may go so far as to undertake serial sponsorships of immigrant women to supply new recruits for prostitution rings.

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121 Some authors report the following comments describing relationships based on MOB marriages that have succeeded: "'It's not subservient, but she'll lay her life down for me,' says quadriplegic professor John Letcham of his spouse Gertrudes Estapia" (*People*, 1985); quoted in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 73. Sue Cormick, on the other hand, says of her marriage to Jim: "Here I am appreciated. And here I have many appliances" (*USA Today*, 1986). Don Springer (age 46) said in an article in the *Denver Post* (1987): "The Philippines are loaded with homemakers. A man like me is not going to find a woman like this [his 26 year-old wife] here." Quoted in M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 38.

122 See M. GLODAVA and R. ONIZUKA, *idem*, p. xv.

123 See E. MENG, *supra*, note 2, p. 222.

124 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 72.

125 R. SCHOLES, *supra*, note 7, p. 8, explains that the rate of spousal violence is higher among couples where the wife is an immigrant than in the general population. Experts agree that spousal violence is more probable because of the wishes of the man that his wife be submissive and the woman's hope to improve her lot. The cycle of violence emerges when the man, tired of his wife's complete dependence, encourages her to get out of the house. When the woman, to please her husband, becomes more independent, the man experiences frustration and takes it out on her.

126 Conversation on July 21, 1999, with Marie-Hélène Paré, a social worker in a shelter for immigrant women who are victims of spousal violence (transcript of conversation in the authors' files). See also M. RAGHU, *supra*, note 3, p. 159.

He holds the bride in debt bondage because he paid for her to immigrate to Canada, and he forces her to participate in slavery-like practices to obtain her freedom.[127]

In cases where the marriage fails or does not take place, returning to her home country often puts the bride in a painful and humiliating position. She is ostracized and her community condemns her for having lost her virginity.[128]

Conclusion

In 1996, the U.S. Congress enacted a law respecting the mail-order bride trade.[129] The preamble summarizes several elements in the description of the MOB phenomenon:[130]

> (a) FINDINGS — The Congress finds as follows:
>
> (1) There is a substantial "mail-order bride" business in the United States. With approximately 200 companies in the United States, an estimated 2,000 to 3,500 men in the United States find wives through mail-order bride catalogs each year. However, there are no official statistics available on the number of mail-order brides entering the United States each year.
>
> (2) The companies engaged in the mail-order bride business earn substantial profits.
>
> (3) Although many of these mail-order marriages work out, in many other cases, anecdotal evidence suggests that mail-order brides find themselves in abusive relationships. There is also evidence to suggest that a substantial number of mail-order marriages are fraudulent under United States law.
>
> (4) Many mail-order brides come to the United States unaware or ignorant of United States immigration law. Mail-order brides who are battered often think that if they flee an abusive marriage, they will be deported. Often the citizen spouse threatens to have them deported if they report the abuse.
>
> (5) The Immigration and Naturalization Service estimates that the rate of marriage fraud between foreign nationals and United States citizens or aliens lawfully admitted for permanent residence is 8 percent. It is unclear what percentage of these marriage fraud cases originate as mail-order marriages.

Before analysing the legal framework governing the MOB trade we have just described, we should examine the various inequalities characteristic of the relationship between the bride and her consumer-husband.

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127 See M. RAGHU, *idem*, pp. 148 and 162.

128 *Idem*, p. 163.

129 *Immigration Reform and Immigrant Responsibility Act*, *supra*, note 112.

130 *Ibid.*

2 Unequal Relationships

MOB agencies justify themselves as meeting places for consenting adults.[131] This assertion, however, fails to take into consideration the various levels of inequality that make the bride subordinate to her consumer-husband.

The "mail-order bride" industry exploits the economic inequality between poor countries and prosperous countries, as well as the most demeaning and discriminatory cultural and ethnic stereotypes of women. This phenomenon thus fosters subordination based on ethnicity, sex and social class within a country, between countries and between individuals.[132] These structures of subordination, which are closely interconnected, contribute to the isolation and vulnerability of the women being trafficked when they enter Canada.

In this part of our study, we shall describe the various levels of inequality between countries and between individuals, leading to the proliferation of the MOB business. We shall describe the inequalities between countries (2.1), sexism at the international level (2.2), the inequalities between the sexes (2.3), ethnic stereotypes (2.4), economic disparities (2.5), generational disparities (2.6) and educational disparities (2.7). Other factors also have an impact on the non-egalitarian status of each spouse within the marital relationship (2.8). We shall conclude this section by examining how the mail-order bride trade sometimes serves to conceal other types of activities (2.9).

2.1 Inequalities Between Countries

In the international context, the first inequality exploited by the MOB trade is the economic inequality between First and Third World countries.[133] The economic plight of developing countries impels their governments, as well as their citizens, to look elsewhere for solutions to their constant poverty. First World countries are lands of plenty sought after by people motivated by a desire to improve their lot and that of their families.

Immigration admission criteria, based mainly on educational and financial qualifications, make it difficult, if not impossible, for people from the Third World to acquire residence, and then citizenship, in the countries of the First World. In this context, the MOB industry has taken advantage of North American pro-family immigration policies, which favour the traditional family unit and the reunification of the members of that unit. The MOB trade uses the institution of marriage to create an express route to Canada, without which it would be impossible for these women to gain access.

RECOMMENDATION

2. We recommend that Canada continue to participate in and fund international development programs to promote economic growth in Third World countries.

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131 See E. MENG, *supra*, note 2, p. 225.

132 See C. CHUN, *supra*, note 1, p. 1170.

133 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 47.

2.2 Sexism on a Global Scale

The effects of "bilateral" sexism combine to create a situation favourable to the development of the MOB trade.

On the one hand, sexism in the countries of emigration encourages trafficking in women. As a result of sexism, women are considered to have less value than men. Since boys remain the hope of the family, cultural and legal customs deprive girls and women of access to property ownership. For example, when it comes to inheritance, male heirs are favoured at the expense of the women in the family. Similarly, the dowry system transfers ownership from a married woman's father to her husband. Finally, legal restrictions on a woman's capacity to enter into a contract, combined with a lack of access to credit, often make it impossible for women to be party to a contract and therefore to acquire property. Women are also less likely to receive an education or pursue higher education. Their ability to find paid employment is therefore diminished. Moreover, even in the workplace they are the first to suffer the effects of instability and are rapidly being replaced by advanced technology.[134] To this generalized sexism can be added the cultural stereotype of the "old maid," causing a woman still young to be considered past the age of marriage, with her prospects for starting a family diminishing with each passing year.[135] For such a woman, the MOB trade can mean realizing her dream[136] of getting married, starting a family, and ensuring her survival and that of her family. Women in rural communities are often more at risk of living in poverty than women in urban areas.[137] Consequently, the secondary role played by women in societies[138] that are often profoundly patriarchal[139] is an incentive for brides to leave their countries. As women are still second-class citizens in many Third World countries, the MOB trade can take advantage of the poor treatment suffered by women who are essentially reduced to the role of breeders, by painting an enticing picture of a better future in the First World.[140] All these factors combine to make these women into citizens who are easily expendable.

In countries afflicted by economic hardship, women are even more likely to bear the costs of poverty. They are the least skilled of the workers, and therefore the least likely to find work in economies with high unemployment.[141] Moreover, some Third World countries, such as the

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134 See M. RAGHU, *supra*, note 3, p. 146.

135 See E. MENG, *supra*, note 2, footnote 40.

136 However, some of these women will be excluded from catalogues and Web sites because of discriminatory age and beauty criteria.

137 See M. RAGHU, *supra*, note 3, p. 146.

138 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 47.

139 *Idem*, pp. 40-42.

140 See M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 38.

141 See M. RAGHU, *supra*, note 3, p. 146.

Philippines, are economically dependent on the foreign currency sent home regularly by their nationals to family members. Such women are therefore encouraged to leave the country to seek their fortunes elsewhere and help support their families.[142] They are even sometimes hailed as heroines because they become mail-order brides to support their families economically, and because they represent an opportunity to immigrate and secure a better future for their relatives.[143] These women are therefore vulnerable to the traffickers who lure them with the prospect of better living conditions in foreign countries.[144] In short, widespread sexism in the countries of emigration leads women to the MOB trade.

On the other hand, sexism in the countries of immigration also leads consumer-husbands to participate in the trafficking in women. As we saw earlier, consumer-husbands are embittered. They reject the women in their own countries, whom they find too demanding of them as husbands and men, too career-oriented and assertive. In short, they regard the women in their own countries as too feminist and insufficiently inclined to satisfy their needs as a husband. These anti-feminist sentiments impel the consumer-husbands to seek, through the MOB trade, wives able to provide them with domestic and sexual services. The stereotypes of docile, submissive and sexually uninhibited women match the fantasies of domineering and controlling consumer-husbands.

In short, mail-order brides actually become merchandise, victims of bilateral sexism. They are victims of sexism both in their countries of origin and in the countries where they settle. They provide domestic and sexual services that are profitable for their families and the countries they leave behind, as well as for the consumer-husbands and the countries to which they immigrate. In this context, the MOB trade amounts to trafficking, and women are the goods being trafficked.

RECOMMENDATIONS

3. **We recommend that Canada participate in and fund international development programs aimed specifically at educating girls and women and giving them access to private property.**

4. **We recommend that the federal and provincial governments initiate campaigns within their territorial and legal jurisdictions to raise public awareness of equality issues in order to combat sexual and ethnic discrimination and minimize the anti-feminist backlash prevailing there.**

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142 See E. MENG, *supra*, note 2, p. 203, and M. RAGHU, *idem*, p. 147.

143 See C. CHUN, *supra*, note 1, p. 1170, and E. MENG, *idem*, footnote 42.

144 See M. RAGHU, *supra*, note 3, p. 147.

2.3 Inequalities Between the Sexes

The mail-order bride trade is a form of sexual exploitation.[145] The sexual inequality between the bride and the consumer-husband is reinforced by a great number of factors. First, the sexism prevalent in her country of origin has convinced the bride that she is a second-class citizen. Second, the anti-feminist stereotypes, leading consumer-husbands to turn to the MOB trade, imply that the objective of a relationship between a man and a woman is the control and domination of the wife by the husband. The relationship is also characterized by the fact that she comes from a developing country while he is a citizen of a First World country. Moreover, the precarious status of the bride places her in a situation of dependence on a consumer-husband who keeps her in fear of deportation and the humiliation of a failed marriage. The consumer-husband's dominant culture in the country of immigration and the bride's isolation from her own cultural group make her even more subordinate to him in terms of the expectations of their social milieu. In a more fundamental way, the intersection of the various inequalities, such as ethnic, economic, educational and generational, place the bride in a constant position of subordination to the consumer-husband.

In short, all the factors combine to relegate the bride to a subordinate position in the male-female dichotomy.

RECOMMENDATIONS

5. **A) We recommend that the federal and provincial governments inform all women newcomers, before they enter Canada and on a regular basis during the first months after their arrival, about their rights as well as Canada's international and national commitments against sexual discrimination.**

6. **A) We recommend that, through the funding of non-governmental organizations that provide assistance to immigrants, the federal and provincial governments initiate campaigns to raise awareness and provide information to mail-order brides about sexual discrimination.**

2.4 Ethnic Stereotypes

Far from being neutral with regard to ethnicity, the MOB industry uses the crudest of stereotypes to promote women as merchandise. By reinforcing ethnic stereotypes, the racist techniques employed by the MOB agencies influence not only the manner in which consumer-husbands treat the brides but also the fate reserved for women from different ethnic groups all over the world.[146] In a more general context, the exploitation of these stereotypes influences the balance of power between countries, since the First World demand for foreign brides helps the economy of the Third World.[147]

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145 *Idem*, p. 145.

146 See C. CHUN, *supra*, note 1, p. 1182.

147 *Ibid.*

Ethnic stereotypes employed by MOB agencies vary from group to group and have a long history. For example, racist stereotypes of Asian women date back to the 18th century in the United States, when Chinese and Japanese women immigrated there as wives or prostitutes to respond to the needs of a male immigrant population.[148] The Asian MOB trade is also based on a racist hierarchy with roots in sexual colonialism by the military. Large numbers of Asian women were enlisted as "comfort girls," first for the Japanese army during the Second World War, and then for U.S. and French soldiers during the war in Indochina.[149] Sexual colonialism led to the creation of the myth of exotic and erotic Asian female sexuality perpetuated by the MOB industry. To this myth must be added that of the "china doll" and the "geisha girl."[150]

In the case of the East European countries, the interaction of a disastrous economic situation and ethnic stereotypes contributes to the vulnerability of women from those countries. The MOB trade in Eastern Europe exploits the European social and economic hierarchy, which places these brides in a position of ethnic inferiority within Europe.[151] The agencies also exploit the ethnic stereotypes of the traditional "Russian" woman.[152]

To date, South American and African women remain underrepresented in the MOB industry. However, brides from there are not spared the racist language of the MOB merchants. On the Web site of the MOB agency "Ebony Gems," we find offensive language used with regard to African brides. We reproduce the list as it appears on that site:[153]

> African, African women, Nubia, Nubian, black, jet, ebony, raven, sable, wicked, chocolate, fudge, sweet, candy, girl, girls, women, woman, bitch, adult, lady, dame, whore, slut, female, spouse, wife, miss, sexy, sex, nigger, nigger bitch, date, dating, singles, club, introductions, marriage, nuptial, gem, gems. . . .

The designers of this Web site have even used white letters on a white background so that this profoundly racist and sexist language becomes readable, in black letters, only if it is selected.

The ethnic stereotypes fed by MOB agencies to consumer-husbands also contribute to situations of frustration provoked by unrealistic expectations. Brides who decide to try their

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148 *Idem*, p. 1177.

149 See M. RAGHU, *supra*, note 3, p. 147; C. CHUN, *supra*, note 1, p. 1174; and E. MENG, *supra*, note 2, pp. 229-30.

150 See C. CHUN, *supra*, note 1, p. 1179, and M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 38.

151 See E. MENG, *supra*, note 2, footnote 10, where the author explains that women from Russia, Poland and the other East European countries are at the bottom of the ethnic hierarchy in Europe.

152 See C. CHUN, *supra*, note 1, p. 1174.

153 http://www.ebonygems.com/ebony5.htm (accessed on June 17, 2000).

luck in the First World through MOB agencies exhibit courage and determination. Will they be the docile, submissive, obedient, erotic and traditional women whom the consumer-husbands wish to control?

Finally, the ethnic stereotypes promoted by the MOB trade accentuate the hierarchy in which the consumer-husband, who belongs to the dominant group, is in a position of power vis-à-vis the bride, who is a member of a visible minority.

RECOMMENDATIONS

5. **B) We recommend that the federal and provincial governments inform all women newcomers, before they enter Canada and on a regular basis during the first months after their arrival, about their rights as well as Canada's international and national commitments against discrimination on the basis of race, colour, national origin or ethnic group.**

6. **B) We recommend that, through the funding of non-governmental organizations that provide assistance to immigrants, the federal and provincial governments initiate campaigns to raise awareness and provide information to mail-order brides about discrimination on the basis of race, colour, national origin or ethnic group.**

2.5 Economic Disparities

We have already described the economic disparities between poor and rich countries. The nation-to-nation disparities also exist between consumer-husband and his bride.[154] Whereas he has enjoyed prosperity, the security of a regular income and benefits, as well as economic and social policies that provide a safety net during hard times, she has experienced poverty, malnutrition, unemployment, economic crisis and government corruption. Consequently, there is a striking parallel between international and individual disparities. The relationship of economic subordination between the country of the bride and that of the consumer-husband is reproduced in the private sphere, between the two individuals.

From the first exchange of letters, the bride is already under the domination of her consumer-husband. As we have seen, the consumer-husband completely finances all the steps leading to immigration by the bride. In Canada, he generally controls the family income and expenditures. The immigrant bride often remains the sole economic support of her family in her country of origin. She is the only hope for members of her family remaining in the Third World who wish to immigrate. The consumer-husband has sole control of the resources to assist the bride's family. The economic dependence of the bride keeps her extremely vulnerable.

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154 The caselaw relating to spousal visas confirms the economic inequality between the consumer-husband and the bride. For example, in *Chmilar* v. *Canada (Minister of Citizenship and Immigration)*, [1999] I.A.D.D. No. 875 (Immigration and Refugee Board of Canada, Immigration Appeal Division) (Q.L.), the Department argued that the bride came from a very poor background and that the consumer-husband had much to offer.

RECOMMENDATIONS

5. **C) We recommend that the federal and provincial governments inform all women newcomers, before they enter Canada and on a regular basis during the first months after their arrival, about their rights as well as Canada's international and national commitments against discrimination on the basis of social status or condition.**

6. **C) We recommend that, through the funding of non-governmental organizations that provide assistance to immigrants, the federal and provincial governments initiate campaigns to raise awareness and provide information to mail-order brides about discrimination on the basis of social status or condition.**

2.6 Generational Disparities

One of the most disturbing aspects of the MOB trade lies in the great age difference between the brides and the consumer-husbands. In *Mail-Order Brides: Women for Sale*, Mila Glodava recounts her experience with 30 couples who met through the MOB business. Of the 30 couples, only two brides were close in age to their consumer-husbands, i.e., there was a difference of 4 to 6 years. The other 28 couples had an average age difference ranging from 20 to 50 years. The consumer-husbands were looking for very young and uneducated wives whom they could keep under their control and dominate. They were afraid that the brides would become like women from the First World if they were more mature in age.[155] For some, the age difference gave them a feeling of rejuvenation, while others complained about their bride's lack of maturity. For their part, the brides expressed their discomfort at receiving frequent disapproving looks in public places where they felt they were being judged for "parading" with their "sugar daddy."[156]

Other studies of mail-order brides confirm the generational disparities that characterize this trade.[157] Canadian caselaw with regard to fiancée and spousal visas confirms the significant age difference between the partners.[158]

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155 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 27.

156 *Idem*, p. 65.

157 See C. CHUN, *supra*, note 1, p. 1168, and E. MENG, *supra*, note 2, p. 205. One author also mentions a Web site for brides from Eastern Europe, where the women are presented as expecting to marry a man at least 10 to 20 years their senior: see D. HUGHES, *supra*, note 44, p. 40.

158 See, for example, *Le* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 55. That case involved an appeal of a decision by a visa officer that the marriage between the consumer-husband and the bride was a marriage of convenience. The Immigration and Refugee Board refused to reverse that decision. The parties had met through the bride's sister, who lived in Canada. The Board noted that the bride was the same age as the consumer-husband's daughter from his first marriage. There was an age difference of 17 years between them. It added: "However, there is no evidence before the panel that such an age gap is frowned upon in the appellant's culture." The following passage concerning the fact that there were no photographs of

Is it necessary to add that a substantial difference in age between the consumer-husband and the bride once again keeps the bride in an unhealthy situation of dependence and vulnerability? The consumer-husband wants this age difference precisely because it further enables him to dominate and exert power over the bride.

2.7 Educational Disparities

The inequality between the bride and the consumer-husband is also apparent in their educational backgrounds. Two scenarios are likely in this regard. First, the bride may have little education or less than her consumer-husband.[159] In general, all the other factors we presented earlier, such as sexism, racism, economic hardship and age differences, combine to make education inaccessible to the brides. Second, the bride may have completed higher education, but her trade or occupation is not recognized in the general criteria for immigrating to Canada. Consequently, she must resort to marriage in order to immigrate to a country in the First World. Perhaps we should also distinguish between brides according to their places of origin and their opportunities for benefiting from the educational system in their home countries.

2.8 Other Disparities and Relevant Factors

At the risk of being accused of overdramatizing the situation of mail-order brides who immigrate to Canada, we have created a "catch-all" subsection for "other disparities and relevant factors" in order to examine a few other inequalities, in addition to those described above. In this subsection we have grouped together communications problems, power relationships connected with status, and the importance of religion.

A number of court decisions regarding fiancée and spousal visas reveal communications problems between the parties.[160] They mention the consumer-husband's expectation that the bride learn his language. Although it is appropriate for a woman who is preparing to immigrate to Canada to learn the language of her new country, it is difficult to understand why so few cases show any efforts on the part of the consumer-husband to learn the rudiments of his wife's language. This communications problem is exacerbated by the fact that, in the majority of

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the marriage illustrates the age difference between the bride and the consumer-husband. The visa officer recounted what the bride had said, as follows: "You advised me that a fortune teller had advised your parents that because of the wide age gap between you and your sponsor it would be better not to take any photos, as it could mean the marriage would break up and you would not live long." In *Horbal* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 53, the man was 57 years old and the woman was 32 (a 25-year age difference). In *Chmilar* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 154, the man was 49 and the woman was 20 (a 29-year age difference). In *Freitas* v. *Canada (Minister of Citizenship and Immigration)*, [1995] I.A.D.D. No. 318 (Immigration and Refugee Board of Canada, Immigration Appeal Division) (Q.L.), there was a 15-year age difference between the man and woman.

159 M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 27.

160 See, for example, *Chmilar* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 154.

cases, the bride does not have any contact with people who belong to her culture and with whom she could communicate in her mother tongue.

Moreover, we think it is worth recalling the difference in status between the consumer-husband and the bride. He is a citizen, living in his own country, in a familiar culture. The bride, even if she has permanent residence, must cope with the unknown and problems of adjustment associated with being an immigrant in a new world. The state of dependence in which the consumer-husband keeps her has the effect of making what he says the bride's only frame of reference concerning her adopted country.

Finally, it is important to mention the role of religion in the MOB business. Studies show that the brides are religious and generally observant. Their religious beliefs inspire them to make the necessary effort to maintain a relationship with the consumer-husband, even in the case of spousal violence. For many brides, divorce would cause profound humiliation, which they try to avoid. However, several anecdotes reveal how religion enables some brides to leave abusive relationships. Indeed, participation in a religious community is often the only activity to which the bride has access on a regular basis. Such a community provides a social environment sensitive to the bride and her needs. It also gives her an opportunity to realistically assess her situation by measuring it against what she sees and hears about the dominant culture. Thus, we must mention the fundamental place occupied by a social circle, such as a community of co-religionists, in the life of a bride newly arrived in Canada.[161]

2.9 The Mail-Order Bride Trade as Camouflage

Finally, for the purposes of this report, we should note that the MOB trade is sometimes a cover for other activities.

The MOB phenomenon refers to the process by which a consumer-husband looks for and finds a bride, with the aim of establishing a marital relationship. As we have seen, the MOB trade sometimes camouflages the slavery-like and abusive expectations of consumer-husbands who are looking for a bride in order to dominate and control her. Furthermore, sometimes MOB businesses are fronts for sex tourism activities in a country other than Canada or for involvement in international prostitution rings. Distinguishing among the various objectives of the MOB phenomenon seems relevant to us, since our study is concerned with the fate of the women who immigrate to Canada through this process.

The sinister portrait we have painted here of the MOB trade suggests it is less than innocuous. The stereotyped, discriminatory, traditional and, at times, romantic expectations of the players involved, as well as the various kinds of inequality which characterize the MOB trade, allow the inference that there is potential for serious abuse. It remains difficult to determine whether naïveté alone would allow the continued belief that relationships without abuse and in good faith could form through the MOB process. If the published and documented accounts of brides are to be taken seriously, they often reflect the experiences of women who escaped abusive situations and accused the MOB process of bad faith, leading to unacceptable living conditions. For the purpose of our legal study, it is important to analyse the abusive situations this trade

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161 Conversation held on July 21, 1999, with Marie-Hélène Paré, *supra*, note 126.

may provoke. However, an approach to this phenomenon that stresses the good would have us believe that we should interpret the silence as well as the absence of empirical studies of mail-order brides in general as being a result of relationships in good faith. Indeed, we should assume that a certain number of mail-order brides marry consumer-husbands in good faith, and that the latter provide them with the traditional marital relationships many of them are seeking. We must therefore keep an open mind about these situations, while nevertheless providing protection to women who immigrate to Canada in this way, in order that we may assess whether their circumstances continue to be acceptable throughout their marital relationship with their consumer-husband.

At the same time, the MOB trade is closely associated with both the sex tourism industry and the criminal practices of international prostitution rings.[162] One indication of this is to be found in the interrelationships among the Internet Web sites specializing in these different industries. MOB Web sites are full of advertisements for sex tourism, escort services and prostitution. Inadvertently happening upon an MOB site, Web surfers will find themselves led into sex-related sites of all kinds, which are impossible to leave without restarting the Web browser. A multitude of hyperlinks connect these various sex-related businesses.[163] Moreover, the same agencies and pimps organize sex tourism, private tours and activities that involve women who work in bars as prostitutes, earning profits for the pimps, the hotels and the bars.[164]

Many documents, reports and studies demonstrate that the MOB trade sometimes provides a cover for other activities not aimed at marriage and immigration of women from other countries, but rather at sex tourism and trafficking.[165] The MOB businesses serve as a pretext for prostitution and the sex trade, with the objective of encouraging sex tourism by North American men. In such cases, the objective is not really for women to immigrate to North America. It should be noted that MOB exporting countries are the most sought-after destinations for sex tourism.[166]

Similarly, it is also important to draw attention to the phenomenon of serial sponsorships as an example of how the MOB trade conceals criminal activities.[167] The phenomenon of

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162 See E. MENG, *supra*, note 2, p. 223, and D. HUGHES, *supra*, note 42, pp. 40, 43-44.

163 See D. HUGHES, *idem*, p. 44.

164 *Ibid.*

165 *Idem*, pp. 43-44. See also M. RAGHU, *supra*, note 3, and M. GLODAVA and R. ONIZUKA, *supra*, note 13, p. 223.

166 E. MENG, *supra*, note 2, p. 224.

167 *Idem*, p. 224, quoting Romano ISBERTO, "Philippines Trying to Stem 'Wife Trafficking' to Australia," *Inter Press Service*, May 21, 1993. Isberto noted that 80 percent of Australian consumer-husbands had sponsored more than one bride. See also D. HUGHES, *supra*, note 42, p. 43, who reports that in Australia, some consumer-husbands have sponsored as many as seven brides.

multiple sponsorships is developing into a system for finding women for international prostitution rings.[168] Under this system, a consumer-husband becomes the sponsor of his fiancée for immigration purposes. The marriage does not take place within 90 days of the bride's arrival, and consequently she loses her immigrant status and must therefore return to her country. Some fiancées leave Canada, while others remain illegally, with or without their consent. Such women then become vulnerable to pimps. After the trial period, the husband seeks another mail-order bride, who suffers the same fate. This problem raises the question of the consequences when the marriage does not take place in Canada in fiancée visa cases. Operators of international prostitution rings profit from, and create, situations in which women find themselves with the status of illegal immigrant.[169]

Conclusion

The interrelated types of subordination, characteristic of the MOB business, place women in a position of being dominated at every level of inequality. The inequalities between the exporting and importing countries in the public sphere have repercussions in the private relationship between the bride and the consumer-husband. In the public sphere, importing countries use their position of dominance in dealing with exporting countries; in the private sphere, the consumer-husband use his position of dominance in dealing with the bride. In both spheres, there are economic, ethnic, gender and class inequalities involved.

As we stated at the beginning of this report, despite the extremely sinister picture of the situation of mail-order brides in relationships with consumer-husbands, we remain convinced of the importance of regulating this burgeoning industry. Banning MOB agencies would have a detrimental effect on women. This is borne out by the fact that since MOB agencies were prohibited in the Philippines in 1990, the problem has only increased and the brides have been abandoned to their fate by denying them any recourse in case of abuse.[170] Consequently, we reject any attempt to overly limit the brides' access to immigration, which might aggravate their situation by driving them underground. It seems preferable to us that Canada adopt an approach of opening its borders in a regulated and controlled way. To do otherwise would make way for a black market in illegal immigration. With this in mind, in the second part of our report we shall examine the legal framework by describing the current law and proposing preventive and remedial legislative reform designed to regulate the mail-order bride industry.

Recommendations Concerning the Mail-Order Bride Trade

1. We recommend that the federal government continue to fund empirical studies of the mail-order bride trade in Canada. The purpose of such studies should be to identify, *inter alia*, the number of women involved in this international trade, the number of consumer-husbands, the identity and number of MOB agencies, the fees they charge, and the profits they generate.

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168 Conversation of July 21, 1999, with Marie-Hélène Paré, *supra,* note 126.

169 D. HUGHES, *supra*, note 42, p. 43.

170 *Idem*, p. 43.

2. We recommend that Canada continue to participate in and fund international development programs to promote economic growth in Third World countries.

3. We recommend that Canada participate in and fund international development programs aimed specifically at educating girls and women and giving them access to private property.

4. We recommend that the federal and provincial governments initiate campaigns within their territorial and legal jurisdictions to raise public awareness of equality issues in order to combat sexual and ethnic discrimination and minimize the anti-feminist backlash prevailing there.

5. We recommend that the federal and provincial governments inform all women newcomers, before they enter Canada and on a regular basis during the first months after their arrival, about their rights as well as Canada's international and national commitments against:
   A) sexual discrimination;
   B) discrimination on the basis of race, colour, national origin or ethnic group; and
   C) discrimination on the basis of social status or condition.

6. We recommend that, through the funding of non-governmental organizations that provide assistance to immigrants, the federal and provincial governments initiate campaigns to raise awareness and provide information to mail-order brides about:
   A) sexual discrimination;
   B) discrimination on the basis of race, colour, national origin or ethnic group; and
   C) discrimination on the basis of social status or condition.

PART II THE LEGAL FRAMEWORK GOVERNING THE MAIL-ORDER BRIDE INDUSTRY IN CANADA

In Part II, we shall analyse the legal framework governing the mail-order bride industry. To this end, we shall examine the various business operations in chronological order to identify the applicable laws at each stage. Accordingly, we shall first examine the economic free-market nature of this industry (section 1), followed by contract law (section 2), immigration law (section 3), and the law pertaining to marriage (section 4) and marriage breakdown (section 5). Private international law also determines the applicable law as well as the jurisdiction of the courts at various stages in MOB operations. In addition, we shall briefly consider two aspects of criminal law that might regulate certain practices in the mail-order bride industry, namely, the provisions prohibiting spousal violence (section 6) and procuring for the purposes of prostitution (section 7). We shall describe as well those aspects of the mail-order bride trade not regulated by law (section 8). Last, we shall propose that mail-order bride agencies operating in Canada be regulated (section 9). As in the preceding part, we shall include the reforms we recommend at the end of each subsection.

From a legal standpoint, the mail-order bride phenomenon is extremely complex. In fact, most of its operations involve both private and public law, and hence both provincial and federal jurisdiction. This report will help to clarify the legal nature of these operations by identifying the legal principles that govern them. However, precisely because of the broad range of legal areas relevant to the MOB trade, it would be unrealistic to attempt to offer an exhaustive analysis of all the subtleties of every applicable law. For the purposes of this report, we have chosen to take a broad view of those areas of law applicable to the MOB trade. Consequently, we have deliberately omitted certain details in order to present an overview of the legal framework governing the MOB phenomenon.

The legal complexity of the practices of the MOB industry leads to an unavoidable conclusion: Any legal reform of the applicable legislation will necessitate collaboration between the provincial and federal governments. Indeed, provincial and federal laws intermesh in all the legal aspects of the various operations associated with the MOB industry. Each level of government is limited as to the law reform initiatives it can undertake because it comes up against the exclusive jurisdiction of the other. Therefore, any reform of the law applicable to the MOB trade must be undertaken by all the provinces and the federal government in concert.

To date, the MOB trade has been completely unregulated (section 1). No Canadian legislation contains specific rules to control it. Consequently, national legislation in areas of contract law, immigration law, and the law of marriage and marriage breakdown govern the various aspects of MOB transactions.

We should note at the outset that originally the contractual aspect of MOB practices seemed to us especially significant for the brides (section 2). Ultimately, however, we conclude that a contract serves only as a façade or pretext for legal transactions much more centred around immigration law and the law of marriage. Although the contractual consequences of the MOB trade are the weak link in the legal framework governing it, we nonetheless consider it

useful to present the results of this part of our research, if only to illustrate the limitations of contractual remedies for brides.

In contrast, immigration law has a more significant impact on the life of the bride (section 3). Thus, this area is treated in more elaborate detail to identify reforms capable of improving the status of brides and thereby reduce their vulnerability and dependence vis-à-vis their consumer-husbands.

The law of marriage (section 4) and marriage breakdown (section 5) calls for a technical analysis with respect to the rules of both private international law and immigration law. The validity, or invalidity, of marriages solemnized abroad or in Canada has many consequences, some of them adverse, for the bride and can jeopardize her immigration status. In addition, we analyse the legal consequences of the failure of the marriage and the breakdown of the marital relationship on the bride's permanent resident status, as well as on the sponsorship undertaking of the consumer-husband.

As we have seen, the mail-order bride trade has close ties to criminal activities. Some abusive consumer-husbands are violent toward their brides (section 6). Others use the mail-order bride trade to supply women to prostitution rings (section 7).

We then list certain aspects of the mail-order bride phenomenon not yet governed by law, such as trafficking in people, introduction agencies, and the contractual and civil liability of the managers of Internet sites (section 8). We conclude with the recommendation that MOB agencies be regulated (section 9).

Finally, in addressing the issue of the legal framework governing the MOB trade, we need to pay special attention to the fairness of the penalties currently imposed on the participants. At the moment, the law exposes brides to penalties, while leaving the introduction agencies and consumer-husbands unpunished.[171] Furthermore, it is important to keep in mind that today legal recourse is an unrealistic option for mail-order brides. They are newcomers whose status in Canada, in the case of brides with fiancée visas, is still precarious. They simply do not have the financial resources to defend their rights. Their culture, beliefs and experiences often lead them to preserve the marital relationship with their consumer-husbands at any cost, and to distrust public and government agencies. In short, legal recourse is a utopian option for many of these brides. However, despite the negative comments regarding legal recourse for mail-order brides, we remain convinced that several reforms could provide solutions to these limitations.

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171 See E. MENG, *supra*, note 2, p. 223, where the author says that in legal terms, the bride is regarded as a prostitute. The pimps, clients and consumer-husbands go unpunished, while the women are treated like criminals. See also INTERNATIONAL ORGANIZATION FOR MIGRATION, *Trafficking and Prostitution: The Growing Exploitation of Migrant Women from Central and Eastern Europe*, Migration Information Programme, May 1995.

RECOMMENDATIONS

7. **We recommend that the legal reforms necessary to regulate the MOB trade begin with a joint effort by the federal and provincial governments.**

8. **We recommend that non-governmental organizations assisting immigrants be granted the necessary funding to help mail-order brides by providing them with information, support and representation in any proceedings.**

9. **We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use in order to protect their rights.**

1 An Economic Free Market

Author Christine Chun states that the MOB trade is "largely unregulated, unmonitored and unstudied."[172] The only form of control over this practice is indirect, through immigration law. However, while immigration law affects the brides, and subjects them to procedures that will affect their futures, it has no control over MOB agencies or consumer-husbands.

Although an analysis of international law is beyond the scope of this report, we note that at this time there is no international regulation aimed specifically at the mail-order bride industry. On the other hand, some countries are beginning to enact national legislation to regulate the MOB trade. Later we shall examine the 1996 law enacted by the United States. However, certain attempts at regulation at the national level have proven futile. For example, on June 13, 1990, the government of Corazon Aquino in the Philippines enacted a law prohibiting the operation of MOB agents, but this type of business has continued to grow since then because economic conditions in that country have remained the same.[173]

The fact that national attempts have ended in failure argues in favour of concerted efforts at the international level to regulate the MOB trade. Nevertheless, the ever-increasing economic disparity between the countries of the First and Third Worlds remains the cornerstone of the MOB phenomenon.

2 Contract Law

The mail-order bride business involves various contracts. We shall examine various principles of private international law in order to determine the Canadian contractual rules likely to govern these contracts. We conclude that Canadian contract law provides few solutions or remedies for mail-order brides. Nonetheless, the results of our research on this topic are useful in explaining why we consider this type of remedy to be secondary and futile.

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172 See C. CHUN, *supra*, note 1, p. 1156.

173 On this subject, see D. HUGHES, *supra*, note 42, p. 40, and C. CHUN, *idem*, p. 1190.

This part of our report deals with the issue of the law governing contracts entered into through the Internet (2.2). Two main contracts are involved in the mail-order bride business, namely, the contract between the bride and the introduction agency (2.3), and the contract between the consumer-husband and the agency (2.4). However, it is important first to briefly review the division of powers in Canada in the matter of contracts (2.1).

2.1 Division of Powers

Contract law, as well as private international law governing contracts entered into with a party from another Canadian province or another country, falls under exclusive provincial jurisdiction pursuant to section 92(13) of the *Constitution Act, 1867*.[174] Consequently, the law differs from province to province. For the purposes of this report, we shall analyse Quebec civil law and the common law of the other Canadian provinces, to illustrate the two major legal traditions in Canada.

2.2 Contracts Entered Into Through the Internet

Contracts entered into through the Internet raise issues of private law, which are a matter for each of the provinces. However, these contracts create difficult problems, the solutions to which present comparable dilemmas in both civil and common law. Consequently, we shall examine these issues at one time, regardless of the peculiarities of each legal tradition.

Contracts entered into in cyberspace challenge the traditional concepts of the law of contractual obligations. In some cases, they necessitate consideration of contractual principles, such as the elements required for the formation of a contract. In other cases, using the Internet to enter into contracts exacerbates the difficulty of characterizing and resolving certain legal issues. The Internet raises a multitude of questions. Does advertising on the Internet constitute an offer or invitation to contract? In cyberspace, who is offering and who is accepting? Is the offer made to a specific person or some undetermined person? Does the offer have a time limit or not? On the Internet, what factors have to be taken into consideration in order to determine the notion of a reasonable time limit? What actions of a customer on the Internet, or a company carrying on business in cyberspace, meet the criteria for acceptance? What degree of active involvement is required to meet the criteria for acceptance? Where is the contract formed? What is the applicable law? What court has jurisdiction to determine disputes? Contracts entered into on the Internet also raise the still obscure notion of an international consumer. Do the new power relationships engendered by the Internet justify consumer protection measures instituted in national jurisdictions?[175]

In Canada, in the absence of any specific law governing contracts entered into on the Internet, traditional legal principles have been adapted to the virtual realities of cyberspace.[176] The

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174 (U.K.), 30 & 31 Vict., c. 3.

175 Conversation of June 20, 2000, with Sylvette Guillemard, a lawyer with expertise in the law governing the Internet.

176 See Jean-Gabriel CASTEL, *Canadian Conflict of Laws*, Toronto and Vancouver: Butterworths, 1997, p. 608, No. 460; David G. MASSE, "Le cadre juridique en droit civil

legal uncertainty surrounding these contracts is a matter of concern in both common law and civil law countries. Indeed, the Internet is presenting the law with new challenges. Because it is so new, the law has not yet found legal solutions to the dilemmas it poses. However, the legal issues raised by the Internet cannot be ignored. For example, cyberspace complicates the determination of which courts have jurisdiction, and what law applies in private international law with regard to contracts. But those questions are beyond the scope of this report. Furthermore, in the end we shall see that contractual remedies are futile for the brides.

2.3 Contract Between Bride and Agency

Private international law determines the law that applies to the contract between the bride and the MOB agency, as well as the jurisdiction of Canadian courts. We shall distinguish here between Quebec civil law (2.3.1) and common law in other provinces (2.3.2).

2.3.1 Quebec Civil Law

The contract between the agency and the bride involves two foreigners. The bride, by definition, is a national of a country other than Canada. With rare exceptions, MOB agencies are situated outside of Canada. We have identified only two Canadian agencies: "Westcoast.com" and "Indiacanadamarriage.com." Most operate from the United States, but there are agencies in other countries such as Russia, Ukraine and the Philippines. It should be noted that in the age of the Internet, it is proving difficult to determine the location of the head office or place of business of a company using a Web site. The mailing address and business address posted on the Web site are often fictitious. It appears to be equally difficult to identify who is running the Web site. What is more, the vast majority of agreements between brides and MOB agencies are entered into outside Canada.

Private international law determines the jurisdiction of Quebec courts, as well as the law applicable to an international contract. First, article 3148 of the *Civil Code of Québec* sets out the jurisdiction of the courts in personal actions of a "patrimonial" nature, such as international contracts. In the case of the contract between a bride and an MOB agency, where both parties are foreign to Canada, the Quebec courts have jurisdiction only where "one of the obligations arising from [the] contract was to be performed in Quebec."[177] As a result, in the case of the contract between the bride and the agency, the Quebec courts will never have jurisdiction except when the MOB agency is in Quebec. Moreover, this remedy is of little value, in view of the obligation to bring proceedings for execution of the judgment in the country of the defendant.

Second, article 3112 of the *Civil Code of Québec* determines the law that applies to the contract. That article applies only to cases where the Quebec courts have jurisdiction, which is excluded under article 3148 of the C.C.Q. However, supposing the Quebec courts had jurisdiction because the agency had a place of business in Quebec, in the absence of a

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québécois des transactions sur l'inforoute," (1997) 42 *McGill L.J.* 403, p. 427, and Louise BÉLANGER-HARDY and Aline GRENON, *Éléments de common law et aperçu comparatif du droit civil*, Scarborough, Ontario: Carswell, 1997, p. 323.

177 Article 3148 (3), *Civil Code of Québec*, S.Q. 1991, c. 64.

designation in the contract of the law applicable to the contract, article 3112 of the *Civil Code of Québec* establishes the principle of proximity:

> If no law is designated in the act . . . the courts apply the law of the country with which the act is most closely connected, in view of its nature and the attendant circumstances.

Hence, the law of the country of the contracting party whose "prestation" [i.e., performance] characterizes the contract will apply to the agreement. In the matter here under study, the prestation of the introduction service provided by the agency constitutes the characteristic prestation. Consequently, the law of the country of the introduction agency will determine the law applicable to the contract, in the absence of a specific designation.

Thus, for the purposes of our report, we assume that the national law of the agency applies to the contract between the bride and the agency. Consequently, in the absence of an express stipulation by the parties regarding the applicable law, and because of the nature of the principal prestation, the contract is not subject to Quebec law unless the introduction agency has a place of business in Canada. There is no point in taking the legal analysis of this issue any further since the solutions lie either in the domestic legislation of each country or in the conclusion of international conventions on the subject, both of which are beyond the scope of our study.

2.3.2 Common Law in the Other Canadian Provinces

As we have seen, the international contract between the bride and the agency raises private international law issues. Common-law conflict of laws rules will also determine the applicable legislation and the jurisdiction of Canadian courts.

In contractual matters, the jurisdiction of Canadian courts is determined either by the place where the contract was formed or by a clause in the contract specifying the competent courts in advance, or by the mutual agreement of the contracting parties after the contract is concluded.[178] Now, since the contract between the bride and the agency is entered into abroad, Canadian courts have no jurisdiction unless the agency has a place of business in Canada or the other two criteria for jurisdiction apply. Hypothetically, it is possible for a Canadian province to be the place where the contract was formed, since we have identified at least two MOB agencies in Canada.[179]

The "doctrine of the proper law" decides the law applicable to international contracts where one of the parties, such as the agency, has a place of business in Canada and executes its

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178 J.-G. CASTEL, *supra*, note 176, p. 208, No. 127.

179 http://www.westcoast.com (accessed on June 8, 2000) and http://www.indiacanada.com (accessed on June 8, 2000).

obligations there. Jean-Gabriel Castel explains the three criteria for determining this as follows:[180]

> The proper law may be determined in three ways: (1) by express selection by the parties; (2) by selection inferred from the circumstances; or failing either of these, (3) by judicial determination of the system of law with which the transaction has the closest and most real connection.

The courts take a number of factors into consideration in determining which law will govern the contract. Those factors include the law of the place of arbitration or court upon which the parties have agreed. Castel lists the other elements relevant in making this determination:[181]

> Other factors from which the courts have been prepared to infer the intentions of the parties as to the proper law are the legal terminology in which the contract is drafted, the form of the documents involved in the transaction, the currency in which payment is to be made, the use of a particular language, a connection with a preceding transaction, the nature and locution of the subject matter of the contract, the residence (but rarely the nationality) of the parties, the head office of a corporation party to the contract, or the fact that one of the parties is a government.

There is no need to undertake a detailed analysis of these criteria in order to conclude that in the case of the contract between the bride and the MOB agency, Canadian law does not apply, save in the exceptional case where the agency has a place of business in Canada.

2.4 Contract Between Consumer-Husband and Agency

Because our study is concerned with the legal status of brides involved in the MOB trade, it may seem strange to analyse the contract between the introduction agency and the consumer-husband. However, an analysis of the legal framework governing the MOB phenomenon must include all the contracts made in this context and point out the limitations of the various remedies. In addition, it is useful to consider the possibility of annulling the contract.

Here again, the civil law of Quebec (2.4.1) is different from the common law (2.4.2) governing the contracts between MOB agencies and Canadian consumer-husbands in the other Canadian provinces.

As we saw earlier, the contractual aspect of the MOB trade is of very limited value for the purposes of regulating and reforming it. In Section 9 of this part of our study we shall look at the possibilities for reform through provincial regulation of the contractual practices of MOB agencies operating in Canada. In contrast to the approach we take in the rest of this report, here we shall limit ourselves to an examination of Quebec law to present our general conclusions with regard to the contractual aspects. We believe that our analysis of Quebec civil law in this

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[180] J.-G. CASTEL, *supra*, note 176, p. 593, No. 448.

[181] *Idem*, p. 596, No. 450.

regard will suffice to demonstrate that these remedies are of little significance. The provincial jurisdictions differ in details which would not provide any truly convincing contractual remedies for our purposes. We therefore consider it pointless to repeat the exercise for the common law jurisdictions, except on the subject of private international law.

2.4.1 Quebec Civil Law

Agreements made between consumer-husbands and MOB agencies raise several legal issues. For the purposes of our report, we shall analyse five factors: we shall first examine private international law (2.4.1.1), consumer contracts (2.4.1.2), disclaimer clauses (2.4.1.3) and actions for annulment (2.4.1.4). We shall then analyse a contract between a consumer-husband and the "Touch of Thai" MOB agency, to illustrate the contractual practices of the MOB trade (2.4.1.5).

2.4.1.1 Private international law

The transaction between a consumer-husband and a mail-order bride agency involves a Canadian citizen. Consequently, the same principles of private international law we examined in the section concerning the contract between bride and agency also apply here.

Under article 3148(3) of the *Civil Code of Québec*, the Quebec courts have jurisdiction over personal actions of a "patrimonial" nature where "one of the obligations arising from a contract was to be performed in Quebec." In the contract between a consumer-husband and an MOB agency, the Quebec courts therefore have jurisdiction if one of the obligations, such as payment, was to be performed in Quebec.

Contracts between consumer-husbands and agencies are very short. Sometimes, however, they include a designation of the law applicable to the agreement. As we shall see later, we registered with an MOB agency, Touch of Thai, in order to analyse the contractual practices of that agency. The contract we signed with Touch of Thai contained the following clause:

> This agreement, your rights and obligations, and all actions contemplated by this agreement shall be governed by the laws of the United States of America and the State of New York, as if the agreement was a contract wholly entered into and wholly performed within New York. This agreement will not be governed by the United Nations Convention on Contracts for the International Sale of Goods.

In this type of situation, the competent Quebec courts apply the law designated in the contract, i.e., the law of New York State. However, we shall see that Quebec consumer protection legislation might apply in certain circumstances.

For this report it was impossible for us to do a complete analysis of contracts between consumer-husbands and agencies because the agencies require payment of subscription fees. We thought it necessary to examine the legal situation flowing from lack of designation of the applicable law in the contract. The consequence is that, in the absence of a designation in the

document, the applicable law is determined by the principle of proximity.[182] Article 3113 of the *Civil Code of Québec* states: "A juridical act is presumed to be most closely connected with the law of the country where the party who is to perform the prestation which is characteristic of the act has his residence or, if the act is made in the ordinary course of business of an enterprise, his establishment." In our case, the services of the MOB introduction agency constitute the characteristic prestation. Consequently, the law of the country where the introduction agency is located determines the law of the contract in the absence of a specific designation of the applicable law. The factors determining the applicability of Quebec law depend on the MOB agency's place of business. If the agency does not operate from Quebec, there are no other factors indicating the applicability of Quebec law. However, if the agency maintains a business office in Quebec, there will be an undeniable connection with Quebec as provided by article 3112 of the *Civil Code of Québec*.

As we have seen, most MOB agencies have a place of business somewhere other than in Canada. Thus, it seems unlikely that Quebec courts would find Quebec law to be applicable, despite the fact that the consumer-husband resides in Quebec. However, the contract between the consumer-husband and the MOB agency raises the difficult question of the applicability of one particular Quebec statute, the *Consumer Protection Act*.

2.4.1.2 The consumer contract

The agreement between a consumer-husband and a mail-order bride agency is a consumer contract within the meaning of the *Consumer Protection Act*. The agreement is a contract for the services of an introduction agency.[183] In addition, the consumer-husband is a "natural person" within the definition of a consumer in the *Consumer Protection Act*.[184] Finally, the agency qualifies as a merchant within the meaning of the civil law. The *Consumer Protection Act* is a statute which is mandatory in Quebec and provides exceptions to the general principles of the law of contractual obligations.[185]

Section 20 of the *Consumer Protection Act* defines a remote-parties contract as follows:

> A remote-parties contract is a contract entered into between a merchant and a consumer who are in the presence of one another neither at the time of the offer, which is addressed to one or more consumers, nor at the time of acceptance, provided that the offer has not been solicited by a particular consumer.

This section raises the question we considered earlier, namely, whether the fact that a consumer-husband has gone on the Internet and knowingly made a transaction on the Web site of a merchant constitutes a solicitation within the meaning of section 20. This issue has

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182 Article 3112 C.C.Q., *supra*, note 177.

183 S. 2, *Consumer Protection Act*, R.S.Q., c. P-40.1 (hereinafter *C.P.A.*).

184 S. 1(e), *C.P.A.*, *idem*, note 183.

185 Sections 261 and 262, *C.P.A.*, *idem*.

not yet been decided by the Quebec courts. However, the trend in Western countries is to recognize the application of consumer law to contracts entered into on the Internet.[186] For the purposes of our report, we have chosen the broadest interpretation, i.e., an interpretation that favours applying consumer law to this type of contract. Hence, in the case of a remote-parties contract, section 21[187] provides that "the remote-parties contract is deemed to be entered into at the address of the consumer." In other words, a contract entered into on the Internet is a consumer contract.

There are specific rules in private international law for determining the law applicable to a consumer contract. Article 3117 of the *Civil Code of Québec* stipulates:

> The choice by the parties of the law applicable to a consumer contract does not result in depriving the consumer of the protection to which he is entitled under the mandatory provisions of the law of the country where he has his residence if the formation of the contract was preceded by a special offer or an advertisement in that country and the consumer took all the reasonable steps for the formation of the contract in that country. . . .
>
> If no law is designated by the parties, the law of the place where the consumer has his residence is, in the same circumstances, applicable to the consumer contract.

Thus, where no law applicable to the agreement is designated by the parties, the general principles of contractual obligations and the specific rules in the *Consumer Protection Act* apply to a contract between a consumer-husband and an introduction agency. On the other hand, a designation of the applicable law, such as the law of the State of New York, does not deprive the consumer of the benefit of Quebec consumer law.

Moreover, article 3149 of the *Civil Code of Québec* determines the jurisdiction of the Quebec authorities, as follows:

> A Quebec authority also has jurisdiction to hear an action involving a consumer contract . . . if the consumer . . . has his domicile or residence in Quebec; the waiver of such jurisdiction by the consumer . . . may not be set up against him.

Quebec courts thus have jurisdiction to decide cases involving an agreement between a consumer- husband and an introduction agency insofar as the agreement qualifies as a consumer contract.

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186 Conversation of June 21, 2000, with Nicole L'Heureux, author of *Droit de la consommaton*, 5th ed., Cowansville, Quebec: Les Éditions Yvon Blais inc., 2000.

187 *C.P.A.*, *supra*, note 183.

2.4.1.3 Disclaimer clauses

MOB contracts contain a number of disclaimer clauses which call for legal analysis. In fact, many of these contractual clauses suggest that MOB agencies feel vulnerable to legal proceedings. The clauses are found in two types of contracts. In the first place, disclaimer clauses appear on the advertising Web sites of the MOB agencies, and they appear again in the contracts between agencies and consumer-husbands.

Let us recall that the advertising Web sites of the MOB agencies do not offer introduction services between mail-order brides and consumer-husbands. Their function is to list together on a single advertising Web site a large number of MOB agency Web sites, each of which is directly accessible by hyperlink, in order to attract consumer-husbands. The advertising Web sites include clauses disclaiming liability such as the following:[188]

> Planet-Love is not in the business of international introductions, translations, or legal services, nor do we guarantee the authenticity or business practices of any service listed in this site, nor of the women or men you may meet through these services. We are a provider of advertising and information only. Any transactions between the businesses we list and customers finding them through Planet-Love are strictly between the listed business and client and Planet-Love shall in no way be responsible for any damages resulting from these transactions or interactions with individuals met through these businesses.

The second type of disclaimer clause appears in the contract between the consumer-husband and the MOB agency. Each contract includes several disclaimer clauses. However, to access a contract requires registering and paying subscription fees to the agency. Because of the costs involved, we limited our analysis to an examination of a contract entered into with the Touch of Thai agency. Our contract included two initial disclaimer clauses relating to the nature of the introduction services offered by the agency:[189]

> Clause 4. Touch of Thai makes no implicit or implied guarantee that it's [*sic*] subscribers will meet or successfully correspond with any person that they attempt to correspond with or contact through this service. Nor do we in any way warranty our subscribers satisfaction with any person or persons they

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188 See http://www.planet-love.com/disclaimer.htm (accessed on June 6, 2000). The disclaimer clause at "Goodwife," also an advertising site, reads as follows: "Goodwife.com is not in the business of international introductions, translations, or legal services, nor do we guarantee the authenticity or business practices of any service listed in this site. We are a provider of advertising and website design and hosting only. Any transactions between the businesses we list and customers finding them through Goodwife.com are strictly between the listed business and client and Goodwife.com shall in no way be responsible for any damages resulting from these transactions."

189 See the contract signed with the Touch of Thai agency, in the files of the authors of this report.

> should correspond with or in any way interact with as a result of the use of our site.[190]
>
> Clause 5. We do not promote, condone or in any way, shape, or form, procure women for our members. Our only aim is to provide a forum for the introduction of consenting adults and by your acceptance of this agreement you hereby hold the service harmless for any resultant harm that may occur in the course of your interaction with any other party you should choose to become involved with as a by product of the use of our site and/or services.

The contract also includes a disclaimer of liability relating to the agency's information service.[191] Further on, the contract contains another disclaimer clause which suggests that Touch of Thai provides more than introduction services, and that it also offers "products":

> No warranty is made by the service regarding any information, services, or products provided through or in connection with the Service, and Touch of Thai hereby expressly disclaims any and all warranties, including without limitation: 1) any warranties as to the availability, accuracy, or content of information, products, or services; 2) any warranties of merchantability or fitness for a particular purpose.

Despite clause 5 cited above, does this clause mean that "brides" are considered "products"?

A very general disclaimer of liability also appears in capital letters at the end of the contract:

DISCLAIMER OF WARRANTIES AND LIABILITY

> TOUCH OF THAI, ITS AFFILIATES, AGENTS AND LICENSORS CANNOT AND DO NOT WARRANT THE ACCURACY, COMPLETENESS, CURRENTNESS, NONINFRINGEMENT, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE NEWS AND INFORMATION AVAILABLE THROUGH THIS SERVICE. NEITHER TOUCH OF THAI NOR ANY OF ITS AFFILIATES, AGENTS OR LICENSORS SHALL BE LIABLE TO YOU OR ANYONE ELSE FOR ANY LOSS OR INJURY, OTHER THAN DEATH OR PERSONAL INJURY RESULTING DIRECTLY FROM USE OF THIS SITE, CAUSED IN WHOLE OR PART BY ITS NEGLIGENCE OR CONTINGENCIES BEYOND ITS CONTROL IN PROCURING, COMPILING, INTERPRETING, REPORTING

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190 http://www.touchofthai.com/terms.htm (accessed on December 7, 1999).

191 Part of clause 5 of the contract with the Touch of Thai agency reads as follows: "Any liability of Touch of Thai including without limitation any failure of performance, error, omission, interruption, deletion, defect, delay in operation or transmission, communications line failure, theft or destruction or unauthorized access to, alteration of, or use of records, whether for breach of contract, tortious behavior, negligence, or under any other cause or action, shall be strictly limited to the amount paid by or on behalf of the subscriber to Touch of Thai for the preceding 6 months."

> OR DELIVERING CORRESPONDENCE AND ANY NEWS AND INFORMATION THROUGH ITS WEB PAGE. IN NO EVENT WILL THIS SERVICE, ITS AFFILIATES, AGENTS OR LICENSORS BE LIABLE TO YOU OR ANYONE ELSE FOR ANY DECISION MADE OR ACTION TAKEN BY YOU IN RELIANCE ON SUCH NEWS AND INFORMATION. TOUCH OF THAI AND ITS AFFILIATES, AGENTS AND LICENSORS SHALL NOT BE LIABLE TO YOU OR ANYONE ELSE FOR ANY DAMAGES OTHER THAN DIRECT DAMAGES (INCLUDING, WITHOUT LIMITATION, CONSEQUENTIAL, SPECIAL, INCIDENTAL, INDIRECT, OR SIMILAR DAMAGES) EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. YOU AGREE THAT THE LIABILITY OF TOUCH OF THAI, ITS AFFILIATES, AGENTS AND LICENSORS, IF ANY, ARISING OUT OF ANY KIND OF LEGAL CLAIM (WHETHER IN CONTRACT, TORT OR OTHERWISE) IN ANY WAY CONNECTED WITH TOUCH OF THAI OR THE NEWS AND INFORMATION IN TOUCH OF THAI SHALL NOT EXCEED THE AMOUNT YOU PAID TO TOUCH OF THAI FOR THE USE OF THIS SERVICE.

Article 1474 of the *Civil Code of Québec* governs clauses of exclusion or limitation of liability between contracting parties. It states:

> A person may not exclude or limit his liability for material injury caused to another through an intentional or gross fault; a gross fault is a fault which shows gross recklessness, gross carelessness or gross negligence.
>
> He may not in any way exclude or limit his liability for bodily or moral injury caused to another.

Thus, Quebec civil law prohibits any exclusion of liability for moral and bodily injury. On the other hand, a disclaimer clause is valid if it excludes liability for material injury resulting from fault other than intentional or gross fault. It is important to point out that a clause external to the contract, such as a disclaimer clause included only on the Web site, must satisfy the criteria set out in article 1475 of the *Civil Code of Québec* in order for it to be used against the other contracting party:

> A notice, whether posted or not, stipulating the exclusion or limitation of the obligation to make reparation for injury resulting from the nonperformance of a contractual obligation has effect, in respect of the creditor, only if the party who invokes the notice proves that the other party was aware of its existence at the time the contract was formed.

The courts interpret this article very narrowly in the case of "contracts of adhesion" [standard form contracts]. The contract between an agency and a consumer-husband satisfies the definition of a contract of adhesion. Consequently, disclaimer clauses in this type of contract will be interpreted in favour of the person who entered into the contract.[192]

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192 Jean-Louis BAUDOUIN and Patrice DESLAURIERS, *La responsabilité civile*, 5th ed., Cowansville, Quebec: Les Éditions Yvon Blais inc., 1998, pp. 783-84, No. 1328.

Finally, to the extent that the *Consumer Protection Act* applies to the contract between the consumer-husband and the MOB agency, section 10 specifies: "Any stipulation whereby a merchant is liberated from the consequences of his own act or the act of his representative is prohibited." The Act thus gives a consumer-husband additional protection by prohibiting disclaimer of liability clauses that relate to material, bodily or moral injury. Whether or not the consumer-husband had knowledge of this clause at the time the contract was formed is immaterial. The gravity of the fault, whether slight, ordinary or gross, is also no longer a consideration. Last, we should recall that the *Consumer Protection Act* is mandatory and "public order" legislation. Consequently, disclaimer clauses in a contract such as the one we entered into with Touch of Thai will have no effect on the consumer-husband's remedies against the agency.

Erroneous information provided on the Web sites might entail the liability of the agency with regard to consumer-husbands. For instance, some MOB agencies provide answers on their Web sites to frequently asked questions. The following passage, from the Web site "Indiacanadamarriage.com," is an example:[193]

> Q: If I sponsor someone and bring them to Canada, am I financially responsible for him/her?
>
> A: The sponsor is financially responsible for the immigrant until both parties are married. When you file a sponsorship application form, you must give full details of your financial status (for example whether or not you own a house and have a decent job etc.). This information allows immigration officials to assess whether or not you are capable of financially supporting your spouse while in Canada.

The MOB agency's response suggests that the sponsorship undertaking of the consumer husband ceases when the marriage takes place. In fact, the consumer-husband is undertaking to the government that he will support the bride for the period prescribed by the visa officer. This period could be 10 years,[194] and the undertaking is binding on the consumer-husband if the spouses divorce or cease to cohabit. The MOB agency attempts to disclaim any liability by including the following clause on its Web site:[195]

> Disclaimer: The following responses should not be considered to be a comprehensive solution. Consequently India Canada Marriage.Com and our

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193 http://www.indiacanada.com (accessed on June 8, 2000).

194 However, the government is considering reducing the sponsorship period to three years. This amendment is planned as one of the many reforms to be made by Bill C-31, *An respecting immigration to Canada and the granting of refugee protection to persons who are displaced, persecuted or in danger*, 2nd session, 36th Parliament, 48-49 Elizabeth II, 1999-2000.

195 http://www.indiacanada.com (accessed on June 8, 2000).

> participating Immigration Consultant cannot warrant the authenticity of any answers presented in these responses.

In our opinion, this disclaimer clause does not exonerate the MOB agency for gross fault. However, an action against the introduction agency is available only to the consumer-husband, because the bride is not a party to the contract.[196] Consequently, these issues may be of little interest to the extent that we are concerned with the legal status of the bride and the remedies offered her by our legal system.

2.4.1.4 A possible remedy: nullity of the contract for violation of the public order

We should note, first of all, that the remedy of nullity of the contract between the consumer-husband and the introduction agency simply does not exist, as we shall see, because of the reality of the immigration criteria for the bride. We should also point out that when the contract expressly states the applicable law, the designated law applies in such a way as to make an action for nullity possible only pursuant to that law, and not Quebec law. However, where no applicable law is designated, and to the extent that Quebec law applies to these contracts, the following comments are pertinent.

A contract between a consumer-husband and an MOB agency could be contested because it violates the rules determining the parameters of public order.[197] Nevertheless, this remedy depends on how the agreement between the parties is characterized. A consumer-husband who retains the services of an agency in order to meet a mail-order bride is acting within the limits of the law, since the cause and object of the contract are lawful: there is nothing to prohibit the sale of introduction services in Quebec.

However, a contract made between a consumer-husband and an agency for the avowed purpose of procuring a bride in order to exploit her and keep her in a servile relationship could be annulled on the grounds that the cause and object violate public order.[198] In fact, this type of contract reduces the bride to merchandise. Its purpose is to provide slavery-like sexual and domestic services. It is related to the prohibited trade in human beings.[199] It also compromises the bride's right to human dignity and it contravenes the spirit of article 10 of the *Civil Code of Québec*, which states: "Every person is inviolable and is entitled to the integrity of his person." We should recall that "the cause of a contract is the reason that determines each of the parties to enter into the contract,"[200] and its object is "the juridical operation envisaged by the parties at the time of its formation."[201] An action for nullity on the grounds that the

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196 Article 1440 C.C.Q., *supra*, note 177.

197 Articles 1411 and 1413 C.C.Q. *idem*. See also Maurice TANCELIN, *Les obligations : actes et responsabilité*, 6th ed., Montréal: Wilson & Lafleur Ltd., 1997, pp. 45-47.

198 *Idem*, Articles 1411 and 1413 C.C.Q.

199 See M. TANCELIN, *supra*, note 197, pp. 118-19.

200 Article 1410 C.C.Q., *supra*, note 177.

201 *Idem*, Article 1412 C.C.Q.

contract is contrary to public order could also be founded on the discriminatory effect of the contract in that it has sexist and racist consequences for the bride. Indeed, a contract between a consumer-husband and an introduction agency raises expectations that the brides, to whom racist exotic characteristics are attributed, will be docile, submissive and servile. As we are dealing with an international contract, international public order would govern this remedy. However, it is highly unlikely that it could be proven that a contract between a consumer-husband and an MOB agency contravenes the international concept of public order since the latter is more permissive than that of Canada.

The legal sanction that attaches to a contract whose object or cause contravenes public order is "absolute nullity."[202] Absolute nullity may be invoked by "any person having a present and actual interest" and it may be "invoked by the court of its own office."[203] Consequently, a bride may not initiate this kind of action. A contract that is null is "deemed never to have existed," and "in such a case, each party is bound to restore to the other the prestations he has received."[204] In addition, criminal sanctions could be added to the civil consequences, if, for example, the contract led to procuring for the purposes of prostitution.[205]

An action for nullity of the contract between the consumer-husband and the MOB agency is plausible in cases where the consumer-husband is guilty of abuse and criminal behaviour. We have seen that the MOB trade has sometimes led to criminal activities, such as spousal violence by the consumer-husband and the bride's being forced by the consumer-husband to participate in prostitution rings.[206] A mail-order bride or else a women's rights advocacy group could have a contract between a consumer-husband and the agency acting as intermediary declared null and void on the grounds of the unlawful nature of the agreement if, for example, the woman was forced to work in a prostitution ring after her arrival in Canada.

However, in a majority of cases, an action for nullity will be of little practical value, since there are other legal consequences of the contractual relationship between the bride and the consumer-husband, such as marriage and immigrant status. An action for nullity might jeopardize the bride's legal relationship to her consumer-husband, and her immigrant status depends on that relationship.

An action for nullity might be useful where the bride loses her legal immigrant status because the consumer-husband fails to consent to the marriage within 90 days after her entry into Canada, in violation of the conditions of the fiancée visa. She could bring an action for nullity of the contract because its object and cause contravened international public order. However, in

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202 *Idem*, Articles 1416 and 1417 C.C.Q.

203 *Idem*, Article 1418 C.C.Q.

204 *Idem*, Article 1422 C.C.Q.

205 See section 221 of the *Criminal Code*, R.S.C. 1985, c. C-46 (hereinafter Cr. Code.).

206 *Ibid.*

all such cases, annulling the contract would have few positive results for the bride since this remedy would not enable her to remain in Canada. It is still preferable, and more realistic, for her to avail herself of the remedies available to her in immigration law. A civil action is decidedly a secondary remedy for a bride who is afraid of being deported.[207]

2.4.1.5 An example of contractual practices

In subscribing to an MOB agency, a consumer-husband enters into a contract. The clauses of such contracts vary from agency to agency. Also, the contracts are available only once the agency's subscription fees are paid. It is therefore difficult to perform an exhaustive analysis of these contracts. However, for the purposes of this report and for a more in-depth analysis, we joined the Touch of Thai MOB agency.

We chose Touch of Thai more or less at random. We selected it on the "Goodwife.com" parent Web site, in the section devoted to Asia. We chose that section because Asian countries, on the whole, have greatest representation in the MOB industry. There is nothing special about this MOB agency to distinguish it from the others. However, it does offer a free video with a six-month subscription, which costs US$39. Also, the transaction was secure.

As we saw earlier, the contract with Touch of Thai contains mainly disclaimer clauses. Apart from the disclaimers, there are few terms in the contract.

Clause 5 of the contract describes the services supplied by Touch of Thai: "We do not promote, condone, or in any way, shape, or form, procure women for our members. Our only aim is to provide a forum for the introduction of consenting adults." The purpose of that clause is to characterize the agency's services in such a way as to avoid being prosecuted for participating in the trade in human beings.

Pursuant to the contract, the consumer-husband must be at least 18 years of age.[208] The subscription to Touch of Thai is an individual subscription, and may not be transferred to anyone else.[209] The contract specifies, in bold letters, that it is a consumer contract for the consumer-husband, as follows: "The material on the Service is for the private, non-commercial enjoyment of Subscribers only. Any other use is prohibited." The consumer-husband must use the services for personal, family or domestic purposes, which makes this a consumer contract within the meaning of the *Civil Code of Québec*.[210] The same clause also prohibits the commercial use of any information provided by the agency. In addition, the contract gives Touch of Thai copyright in any information it provides.

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207 See E. MENG, *supra*, note 2, footnote 273.

208 Clause 2 of the contract states: "By your agreement to the terms and conditions of membership, you affirm that you are 18 years of age or older."

209 Clause 5 of the contract states: "Subscription may not be assigned or transferred to any other person or entity."

210 Article 1384 C.C.Q., *supra*, note 177.

The contract prohibits the use of the Web site or any information for criminal activity.[211] That prohibition alludes to the links between the mail-order bride trade and criminal activities, such as prostitution rings and sex tourism. The consumer-husband gains access to the service by using an identification number as well as a confidential password.[212] However, the agency reserves the right to change the subscriber's password at any time because of the possibility, among others, of "misuse, misrepresentation or fraud."[213]

The subscription fee may be paid electronically through a secure service.[214] A six-month subscription to the agency's services must be paid in full and in advance.[215]

Touch of Thai and the consumer-husband may terminate the contract unilaterally simply by sending a notice by e-mail at any time and for any reason. In addition, Touch of Thai reserves the right to terminate the contract without notice, because of business[216] or other contingencies.

The last sentence of the contract states, in capital letters and bold type: "IF YOU AGREE TO ALL THE ABOVE TERMS IN THEIR ENTIRETY CLICK ENTER TO JOIN NOW." The purpose of this clause is to ensure that the consumer-husband cannot claim ignorance of the terms of the contract, including the disclaimers.

Finally, we should say a few words about the free video that Touch of Thai sends out to consumer-husbands who subscribe to the service. We subscribed to the introduction agency pretending to be a consumer-husband in order to get a better idea of how the mail-order bride business works. The 30-minute video is a dismal and amateurish look at sex tourism and nightlife in Bangkok. It shows young Thai women dancing in bars and in the streets. The narrator who is filming them tries to get them to say that they want to marry an American man. Because they do not understand English and are unable to answer the translator, they just keep dancing in a provocative and sexually explicit manner. The camera often shows nothing but their torsos. The video takes the viewer on a tour of the bars where young women

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211 Clause 3 of the contract states: "You further agree that you will not in any way use or encourage the use of this site or it's [*sic*] services for any activity deemed to be in violation of law. You further agree that if the service finds you to have engaged in illegal activity pertaining to the use of this site or its facilities we, at our discretion, may terminate your membership at will."

212 Clause 5 of the contract.

213 *Idem.*

214 *Idem.*

215 Clause A: "You pay for 6 months in advance."

216 Clause 5 states: "While we expect to be highly successful, no one can predict the future being that all business ventures are subject to circumstances that may be beyond their control or expectations." Clause B of the same contract stipulates: "Touch of Thai may discontinue or change this service, or its availability to you, at any time, and you may always terminate your subscription at any time."

in underwear, each sporting a number, writhe around a pole. Then the narrator explains the various ways of meeting these potential brides, through Touch of Thai.

This example of contractual practices shows mainly that some agencies are afraid of legal proceedings. The contract we analysed contains an excessive number of disclaimers in an attempt to cover every situation in which the agency and its workers might incur liability. Furthermore, it is a standard form contract since the stipulations in the contract are drawn up and imposed by the Touch of Thai agency and cannot be negotiated with the consumer-husband.

2.4.2 Common Law in the Other Canadian Provinces

In principle, the general rules of common law with respect to private matters apply in all the provinces of Canada, subject to the specific legislation of each province, such as consumer protection and human rights legislation. In fact, the general system of the common law involves a presumption of uniformity, i.e., that the same legal rules will hold in the various jurisdictions where it is applied.[217]

With regard to contracts, the applicable law will be determined either by the place where the contract is formed, by a clause in the agreement specifying the applicable law or by the mutual agreement of the contracting parties.[218] As we have seen, the place a contract is formed, when the contract is entered into on the Internet, presents a problem unless the agency has a place of business in Canada, in which case the contract with the consumer-husband can be regarded as having been formed here.

As in the case of the contract between bride and introduction agency, if there is no express designation in the agreement, the doctrine of the "proper law" will determine the law applicable to the agreement between consumer-husband and agency. That doctrine is defined as follows:[219]

> the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

As we have seen, under the doctrine of the "proper law," when the parties have not expressly designated the law to which they wish to be subject,[220] the courts will infer the intention of the parties from the circumstances surrounding the formation of the contract. The language of the contract, the currency used, the nature of the obligations and the residence of the parties will all

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217 See L. BÉLANGER-HARDY and A. GRENON, *supra*, note 176, p. 71.

218 See J.-G. CASTEL, *supra*, note 176, p. 176, No. 127.

219 Albert V. DICEY and John H.C. MORRIS, *The Conflict of Laws,* 11th ed., 1987, p. 1161 quoted in J.-G. CASTEL, *idem*, p. 589, No. 446.

220 See J.-G. CASTEL, *idem*, p. 593, No. 448.

be relevant factors in determining the applicable law. When the intention of the parties cannot be discerned by an examination of these factors, the courts will go to the legal system "closest and most connected" to the transaction.[221] The factors that determine connection include the place in which the contract was formed, the place where obligations are performed, the residence or place of business of the parties, and the nature and purpose of the contract.[222]

In the case at hand, the factors pointing to a connection between Canadian law and the contract between consumer-husband and introduction agency are tenuous, except in rare situations where the MOB agency has a place of business in Canada.[223]

Our analysis of Quebec civil law in this regard is sufficient to establish that contractual remedies are unrealistic and futile for the bride. We shall not undertake a similar legal analysis here of the common law, although we acknowledge that there would be certain differences.

3 Immigration Rules

Since 1970, Canadian immigration policy has been based on a point system. However, that policy also provides for certain classes of immigrants, which allow foreigners to settle in Canada without being subject to the point system, such as the family or refugee class. Mail-order brides immigrate to Canada in the family class, as dependants of their consumer-husbands. They enter the country with a fiancée visa or spousal visa.

To understand the legal status of mail-order brides, we must know the procedures for immigrating to Canada. To this end, we shall first briefly examine the division of powers in the matter of immigration to Canada (3.1) and then describe the Canadian immigration system in general (3.2). Third, we shall address the reasons why women resort to the mail-order bride trade (3.3). Next, we shall examine the conditions attached to the status of wife (3.4) or fiancée (3.5) of a consumer-husband in Canada. We shall propose a reform to prohibit multiple sponsorships (3.6). We shall conclude this section with a brief analysis of the U.S. immigration model (3.7).

3.1 Division of Powers

The Canadian Constitution provides that both Parliament and the provinces may legislate in relation to immigration.[224] Legislative power is shared. However, "Any law of the Legislature of a Province relative to . . . immigration shall have effect in and for the Province so long and

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221 *Idem*, p. 599, No. 452.

222 *Idem*, pp. 599-601, Nos. 452-53.

223 We identified two Canadian agencies: http://www.indiacanada.com (accessed on June 8, 2000) and http://www.westcoast.com (accessed on June 8, 2000).

224 Section 95, *Constitution Act, 1867*, *supra*, note 174.

as far only as it is not repugnant to any Act of the Parliament of Canada."[225] Accordingly, a provincial legislature may enact a law in relation to immigration as long as it is not contrary to the purpose of the federal law.[226] Indeed, the Constitution of Canada expressly provides that federal legislation will be paramount.[227]

For several years, all Canadian provinces, with the exception of Ontario, have exercised jurisdiction in relation to immigration pursuant to section 108(2) of the *Immigration Act*.[228] Through agreements, the provinces are participating in the development of Canadian immigration policy, by asserting their particular needs.[229] For example, British Columbia gives priority to businesspeople,[230] while Manitoba wants to fill its shortage of workers in the economic and industrial sectors of that province.[231] For the purposes of our report, it would be pointless to deal with each of these bilateral agreements. However, it is important to note that the powers exercised by the provinces in relation to immigration are limited. For example, the 1991 Canada-Quebec Accord transfers the power to determine policy regarding the selection and admission of immigrants.[232] That power, however, is limited. As regards mail-order brides, it should be noted that the division of responsibilities between Parliament and the province of Quebec in relation to the family class is set out in sections 13 and 14 of the *Canada-Quebec Accord Relating to Immigration and Temporary Admission of Aliens*,[233] dated February 5, 1991:

> 13. Canada has sole responsibility for the admission of immigrants in the family class and the assisted relative class, including the responsibility

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225 *Ibid.*

226 See generally Peter W. HOGG, *Constitutional Law of Canada*, 3rd ed., Vol. 1, Toronto: Carswell, 1992, pp. 16-18, and Henri BRUN and Guy TREMBLAY, *Droit constitutionnel*, 3rd ed., Cowansville, Quebec: Les Éditions Yvon Blais inc., 1997, p. 457.

227 See Jeffrey A. TALPIS, "Quelques considérations visant la prevention des conflits en matière de validité du marriage en droit international privé québécois et en droit de l'immigration familiale," in *Développements récents en droit de l'immigration*, Cowansville, Quebec: Les Éditions Yvon Blais inc., 1998, p. 158.

228 *Supra*, note 4.

229 See for example, the Canada-Saskatchewan Immigration Agreement, 1998: http://www.cic.gc.ca/french/press/98/9817-prf.html (accessed on May 2, 2000).

230 See the Canada-British Columbia Immigration Agreement, 1998: http://www.cic.gc.ca/french/press/98/9826-prf.html (accessed on May 2, 2000).

231 See the Canada-Manitoba Immigration Agreement, 1998: http://www.cic.gc.ca/french/press/98/9835-prf.html (accessed on May 2, 2000).

232 See Donald GALLOWAY, *Immigration Law*, Concord, Ontario: Irwin Law, 1997, p. 41.

233 (1991), G.O.Q. II. 1250, signed on February 5, 1991, and in force April 11, 1991, known as the Tremblay-McDougall Agreement (hereinafter "Canada-Quebec Accord").

for establishing whether an individual immigrant belongs in either of those classes.

14. Canada has sole responsibility for the establishment of selection criteria for family class immigrants and Quebec shall be responsible for the application of those criteria, if any, with respect to such immigrants destined for Quebec.

Consequently, only Canada may define the family class and determine the selection criteria.

It must be noted that while a constitutional conflict between the exercise of provincial and federal powers may result from the enactment of a provincial statute in relation to immigration, it can also arise through the application of laws within provincial jurisdiction, such as those relating to marriage.[234]

Finally, pursuant to section 91(25) of the *Constitution Act, 1867*,[235] the federal government has exclusive jurisdiction in regard to "naturalization and aliens."

3.2 Canada's Overall Immigration System

For our purposes, the *Immigration Act*[236] and the *Immigration Regulations, 1978*[237] govern federal law in regard to immigration.[238]

Foreign nationals seeking to enter Canada are divided into two categories: they are either immigrants or visitors.[239] Immigrants are assigned to one of three classes: the independent class (3.2.1), the family class (3.2.2) or the refugee class (3.2.3). Immigrants admitted to Canada in one of these three classes are granted permanent residence. They may apply for Canadian citizenship after residing in Canada for three years. Visitors have only temporary status during their stay in Canada (3.2.4). Finally, we shall discuss the rules governing changes in immigration class after entering Canada (3.2.5).

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234 J.A. TALPIS, *supra*, note 227, p. 159.

235 See *supra*, note 174.

236 See *supra*, note 4.

237 SOR/78-172, (1978) 112 Gaz. Can. II. 757 (hereinafter *Immigration Regulations, 1978*).

238 Several Canadian provinces also exercise their power to legislate in regard to immigration. Quebec, for example, has enacted the *Act respecting immigration to Quebec*, R.S.Q. c. I-O.2, and the *Regulation respecting the selection of foreign nationals*, R.R.Q., c. M-23.1, r.2.

239 See the Web site of Citizenship and Immigration Canada: http://www.cic.gc.ca (accessed on May 4, 2000) and D. GALLOWAY, *supra*, note 232.

3.2.1 The Independent Class

Immigrants in the independent class include investors, entrepreneurs, self-employed workers, skilled workers and any other person who applies for immigration. In recent years, Canadian immigration policy, as set out in the annual immigration plan,[240] has aimed for a significant increase in this class of immigrants, at the expense of the family class.[241]

Before obtaining permanent residence, applicants in the independent class are assessed on the basis of the following selection factors:[242] education (a maximum of 16 points is awarded for this factor),[243] education/training (maximum of 18 points),[244] experience (maximum of 8 points),[245] occupational factor, i.e., possibility of employment (maximum of 10 points),[246] arranged employment or designated occupation (maximum of 10 points),[247] demographic factor (maximum of 8 points),[248] age (maximum of 10 points),[249] knowledge of English and French (maximum of 15 points),[250] and relatives in Canada (maximum of 5 points).[251] An applicant must score at least 60 points on the first nine factors. Additional points may be awarded at an interview, where personal suitability (adaptability) is assessed (maximum of 10 points).[252] An applicant must score a minimum of 70 points to be accepted as an independent immigrant.[253] In addition to these criteria, health[254] and good character[255]

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240 Part VII, *Immigration Act, supra,* note 4.

241 See D. GALLOWAY, *supra*, note 232, p. 35.

242 The Department of Citizenship and Immigration Canada provides a self-evaluation form for applicants who wish to apply as independent immigrants. See http://www.cic.gc.ca/french/immigr/guide-cf.html (accessed on May 4, 2000). See s. 8(1), 9(1) and Schedule 1, *Immigration Regulations, 1978*, *supra*, note 237.

243 Schedule I, factor 1, *Immigration Regulations, 1978, idem.*

244 *Idem*, factor 2.

245 *Idem*, factor 3.

246 *Idem*, factor 4, except for entrepreneurs and investors: s. 8(1)(c), *idem.*

247 *Idem,* factor 5, except for entrepreneurs, and self-employed workers: s. 8(1)(b) and (c), *idem.*

248 *Idem*, factor 6.

249 *Idem*, factor 7.

250 *Idem*, factor 8.

251 *Idem*, factor 9.

252 *Idem,* s. 9(1)(i) to (iii), *Immigration Regulations, 1978.*

253 An entrepreneur or investor must obtain a minimum of 25 points; see s. 9(1)(i) to (iii), *idem.*

requirements must be met. Pursuant to the immigration agreements between Canada and the provinces, some provinces have adopted their own selection criteria for foreign nationals.[256]

3.2.2 The Family Class

Mail-order brides immigrate to Canada as members of the family class. They enter Canada on a fiancée visa or spousal visa. In order to obtain the visa, the consumer-husband must provide an undertaking to sponsor the bride, pursuant to which he commits himself to supporting her. Upon her arrival in Canada, the bride has permanent residence status. However, in the case of a fiancée visa, the status has conditions attached.

Because of the importance of the family class in the mail-order bride trade, we shall further explain the criteria under this heading in the federal legislation. To that end, we shall distinguish between family policy with respect to immigration (3.2.2.1), the make-up of the family class (3.2.2.2), and the application process for a visa in that category (3.2.2.3.)

3.2.2.1 Family policy in immigration law

Until recently, immigration by way of the family class was the primary source of immigration to Canada.[257] However, Canadian immigration policy is now designed to increase the independent class and reduce the family class.[258] This major change in Canadian policy affects the mail-order bride trade. Canada must be vigilant to ensure that this change does not have the effect of entailing a corresponding increase in illegal trafficking in women. Despite the new policy, however, one of the objectives of Canadian immigration law is to facilitate the reunion of Canadian citizens and permanent residents with their close relatives from abroad.[259] Quebec also adheres to this policy.[260] This objective provides a partial explanation for the proliferation of the MOB trade for the purposes of immigrating to Canada.

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254 Section 19(1)(a), *Immigration Act*, *supra*, note 4. All immigrants are subject to a mandatory medical examination, pursuant to s. 11 of the *Immigration Act, idem*, and s. 22 of the *Immigration Regulations, 1978.*

255 Section 19(1)(c) to (1)(l), *Immigration Act*, note 4.

256 For example, see the *Regulation amending the Regulation respecting the selection of foreign nationals*, (2000), G.O.Q. II. 2963, and the *Regulation respecting the weighting applicable to the selection of foreign nationals* (2000), G.O.Q. II. 2805.

257 J.A. TALPIS, *supra*, note 227, p. 139.

258 D. GALLOWAY, supra, note 232, pp. 34-35.

259 Section 3(c), *Immigration Act*, *supra*, note 4.

260 Section 3(b), *Immigration Act*, *supra*, note 238.

3.2.2.2 The make-up of the family class

Immigrants in the family class[261] include people, such as mail-order brides, who are sponsored by a close relative who is a Canadian citizen or permanent resident of Canada and at least 19 years of age.[262] The class includes *inter alia*, wives and husbands,[263] and fiancées and fiancés.[264] These applicants are not subject to the point system[265] but must still meet the health[266] and good character[267] requirements.

3.2.2.3 Application process for a family-class immigrant visa

Because the family class constitutes the principal way in which mail-order brides immigrate to Canada, we thought it appropriate to briefly describe the different steps in the application process. Immigration statutes and regulations set out conditions for sponsoring members of this class.

The *Immigration Regulations, 1978* impose two requirements for immigration to Canada as a member of the family class: (1) the bride must complete an application for an immigration visa; (2) the consumer-husband, a Canadian citizen or permanent resident, must sponsor the bride.[268]

The process can be initiated by either the bride or the consumer-husband. The practices of the MOB trade, which we examined earlier, suggest that in a majority of cases, the consumer-husband, assisted by the introduction agency, makes the application for a visa on behalf of the bride by submitting his sponsorship undertaking to Canadian immigration authorities. The consumer-husband pays the administrative fees and provides a written sponsorship undertaking. This undertaking consists of a written promise to support the bride and guarantee that she will not become dependent on Canadian social assistance programs.[269] The visa officer

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261 See s. 2(1), *Immigration Regulations, 1978, supra*, note 327.

262 Section 2(1) "sponsor," and s. 6(2), *Immigration Regulations, 1978, idem.*

263 Section 2(1)(a) *idem*, and s. 19(a), *Regulation respecting the selection of foreign nationals, supra*, note 238.

264 Section 2(1)(f), *Immigration Regulations, 1978, idem*, and s. 19(e), *Regulation respecting the selection of foreign nationals, idem.*

265 Section 8(1), *Immigration Regulations, 1978, idem,* exempts them.

266 Section 11(1), *Immigration Act*, supra, note 4. See also the definition of "medical officer" in s. 2(1) of the *Immigration Act, idem,* and s. 19(1)(a) of the Act on the requirement of a second medical opinion.

267 See Section 19(1) for the criterion of inadmissibility based on a criminal record, *idem.*

268 Davies B.N. BAGAMBIIRE, *Canadian Immigration and Refugee Law*, Aurora, Ontario: Canada Law Book, 1996, p. 28, and D. GALLOWAY, *supra*, note 232, Chapter 6.

269 Section 2(1), *Immigration Regulations, 1978, supra*, note 237.

decides the length of the sponsorship period, which can be up to 10 years.[270] The immigration officer in Canada must assess the financial capacity of the consumer-husband by comparing his income with the minimum income established by Statistics Canada as a guideline.[271] Canadian caselaw has established that the visa officer must also take into account such factors as the stability of the consumer-husband's employment, his willingness (as well as that of his family) to assist the bride, the bride's future prospects, how quickly the bride is likely to establish herself in Canada, and the consumer-husband's assets.[272] Finally, it is worth recalling that the primary objective of the family class, for immigration purposes, remains the reunification of Canadian citizens and permanent residents with their close relatives living abroad.[273] We should note that if the consumer-husband lives in Quebec, the Government of Quebec determines whether the sponsor is capable of fulfilling the obligations flowing from his undertaking.[274]

When the consumer-husband's sponsorship undertaking satisfies the eligibility criteria, it is sent by the immigration officer to the visa officer in the bride's country to be assessed.[275] The bride submits her application for an immigrant visa to a Canadian embassy or office in her country of origin.[276]

Once the visa application of the bride and the sponsorship undertaking of the consumer-husband both have been completed and deemed eligible, they are then assessed by a visa officer in the bride's home country. The officer must first determine whether the consumer-husband may act as sponsor of the application, and then whether the bride is a member of the family class.[277] The date upon which the application and administrative fees are received is when these two conditions are assessed. The onus of proving that she is a member of the family class is on the bride.[278] Failure to answer truthfully any question relevant to the immigration

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270 See *supra,* note 4.

271 See D. GALLOWAY, *supra*, note 232.

272 See D.B.N. BAGAMBIIRE, *supra*, note 268, p. 30.

273 *Idem*, p. 33.

274 Section 6(3.2), *Immigration Regulations, 1978*, *supra*, note 237.

275 Section 2(1), *idem.* In the provinces exercising their powers with respect to immigration, the undertaking of the consumer-husband can be transferred to the province. Only Quebec has entered into such an agreement under the Canada-Quebec Accord. See D.B.N. BAGAMBIIRE, *supra*, note 268, p. 30.

276 See D.B.N. BAGAMBIIRE, *idem*, p. 28.

277 Section 77, *Immigration Act, supra*, note 4.

278 Section 8(1), *Immigration Regulations, 1978*, *supra*, note 237.

process, whether in the application or asked by the visa officer, may result in the refusal of the sponsorship.[279]

Pursuant to the *Immigration Regulations, 1978*, a sponsor who fails to fulfil his obligations pursuant to a previous undertaking will not be allowed to sponsor another person.[280] Canadian courts have considered a sponsor in default as soon as he ceases to support the immigrant, regardless of the circumstances leading to termination of that support.[281] This condition is particularly important in the context of practices in the MOB trade, insofar as it is a way of limiting serial sponsorships by consumer-husbands.[282]

If the immigration process is successfully completed, the mail-order bride is granted permanent resident status in Canada.

3.2.3 The Refugee Class

The refugee class exists for humanitarian purposes.[283] Immigrants in this class are persons fleeing persecution. It is intended for those who qualify under the *United Nations Convention Relating to the Status of Refugees*[284] as well as the specific regulations of the *Immigration Act*.[285] Pursuant to these provisions, some people apply for admission to Canada as refugees from outside Canada, while others do so upon their arrival in Canada.[286] In the case of mail-order brides, only the second procedure (i.e., claiming refugee status while residing in Canada) is relevant.

In addition, it is important to point out the existence of the federal program entitled Women at Risk[287] — a special program within the refugee class, which, as its name indicates, is intended specifically for women. It provides for lower admission criteria for certain women who are particularly vulnerable as refugees, or who have suffered serious trauma likely to require

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279 Section 9(3), *Immigration Act*, *supra*, note 4. On the strict interpretation of this section, see D.B.N. BAGAMBIIRE, *supra*, note 268, p. 29. For a more general overview, see D. GALLOWAY, *supra*, note 232, pp. 126-27.

280 Section 6(1)(b)(ii), *Immigration Regulations, 1978*, *supra*, note 237.

281 See D.B.N. BAGAMBIIRE, *supra*, note 268, p. 30.

282 D. HUGHES, *supra*, note 42, p. 43.

283 D. GALLOWAY, *supra*, note 232, p. 175.

284 *U.N. Convention Relating to the Status of Refugees*, signed at Geneva, July 28, 1951 (189 U.N.T.S. 150, 1967 Protocol 606 U.N.T.S. 267 (in force in Canada September 2, 1969).

285 *Humanitarian Designated Classes Regulation*, SOR/97-183, (1997) 131 Gaz. Ca. II. 1184, and the *Regulation amending the Immigration Regulations, 1978*, SOR/97-184, (1997) 131 Gaz. Can. II. 1195.

286 D. GALLOWAY, *supra*, note 232, p. 117.

287 See http://www.cic.gc.ca/french/refugee/women%2df.html (accessed on May 5, 2000).

special measures to enable them to settle in Canada.[288] It is intended "to offer resettlement opportunities that might not otherwise be available to women whose ability to start life anew is hampered by young dependent children, poor ability in either official language, weak job skills, or a combination of these factors."[289] Few women enter Canada under this program, which has been criticized because it does not offset the advantage enjoyed by men in the refugee class.[290]

The granting of refugee status, whether under the general scheme or through the Women at Risk program, requires the presence of a number of factors, such as a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, and the inability, because of that fear, to avail oneself of the protection of the country of which one is a citizen.[291] Only a minuscule number of mail-order brides are likely to satisfy those conditions. We therefore consider it pointless to undertake a legal analysis of this immigration category for the purposes of our report.

3.2.4 The Visitor Class

Visitors enter Canada for a limited stay, without intending to immigrate to Canada.[292] This category includes tourists, people visiting relatives in Canada, business travellers, students and temporary workers. They may apply for an extension of their visitor status. They must have an employment authorization in order to work. To obtain that authorization, they must demonstrate that there is no Canadian citizen or permanent resident who could fill the position waiting for them.

3.2.5 Change of Status

Finally we should note that, in principle, a person admitted to Canada in one category cannot change status while in Canada.[293] A person must leave Canada in order to make a fresh application for admission in the same or another category.[294] Thus, a mail-order bride who enters Canada as a spouse or fiancée in the family class, and whose relationship with the consumer-husband breaks down, cannot satisfy the criteria for another class, such as independent immigrant. Unless there are exceptional circumstances, she must leave the

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288 D. GALLOWAY, *supra* note 232, p. 178.

289 See http://cicnet.ci.gc.ca/french/refugee/women.f-html (accessed on June 17, 2000).

290 See Audrey MACKLIN, "Refugee Women and the Imperative of Categories," (1995), 17 *Hum. Rts. Q.* 213, cited in D. GALLOWAY, *supra*, note 232, p. 178.

291 Section 2(1), "Convention refugee," *Immigration Act*, supra, note 4. For an excellent review of the legal rules applicable to refugee status in Canada, see D. GALLOWAY, *supra*, note 232, Chapters 9, 14 and 15.

292 Section 2(1), *Immigration Regulations, 1978, supra*, note 327.

293 See on this subject: http://www.cic.gc.ca/french/pub/immlaw_f.html#back4 (accessed on June 20, 2000).

294 Section 9(1), *Immigration Act, supra*, note 4.

country before making a new application for immigration. In addition, in some cases a person who has been ordered deported or excluded may not re-enter Canada on a visitor's visa without the consent of the Minister of Citizenship and Immigration.[295] However, the *Immigration Act* provides for exceptions to this rule. For example, a person may make a refugee claim when she is already in Canada.[296] Furthermore, a person may apply for an exemption from this rule by way of a Minister's permit.[297]

3.3 Why Women Become Mail-Order Brides

We have no information which would enable us to know whether women who participate in the MOB trade had previously tried to immigrate to Canada or another country under the general admission criteria. Nevertheless, our description of the admission criteria for immigrating to Canada has allowed us to identify some of the reasons why women would become mail-order brides, rather than apply under the general immigration rules.

First, these women are unable to accumulate enough points to immigrate to Canada in the independent class. For example, many mail-order brides would not meet the education criteria. Someone who has not completed secondary school will not earn any of the 16 points allotted for education.[298] This factor is particularly damaging for women in the Third World, where access to advanced education is reserved for men and the higher social classes. While some brides may obtain points for education, if the trade or occupation in which they are employed does not qualify under arranged employment or is not a designated occupation, or their vocational training and experience does not allow them to qualify, they will not score enough points on this factor. Finally, their total points may simply remain below the 70 points necessary to immigrate to Canada in the independent immigrant class, after taking the other factors into account.

Second, the restricted application of the Women at Risk program, combined with the bias in the refugee class in favour of men, suggests that mail-order brides have little to expect from the Canadian immigration process. Third, the visitor category does not lead to immigration.

Last, Canadian legislation and the bilateral immigration agreements between the federal government and the provinces give priority to the traditional family unit, family reunification and fostering family relationships. Hence, these women, who are not directly admissible into the independent immigrant class of the Canadian immigration system, resort to engagement or marriage, in line with the pro-family public policy prevalent in North America. The family class provides a genuine, effective and quick way to immigrate since the women are not assessed under the independent immigrant class point system, and the consumer-husbands sponsor their admission to Canada and undertake to support them financially. They need

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295 Sections 55(1) and (2), *idem.*

296 Section 44, *idem.* On this subject, see D. GALLOWAY, *supra*, note 232, pp. 293-310.

297 Sections 37 and 38, *idem.*

298 See D. GALLOWAY, *supra*, note 232, p. 155.

only comply with the health and good character requirements. Marriage allows them to avoid immigration quotas and long waiting periods, and presents a realistic opportunity for entering Canada.

Mail-order brides are granted landing in Canada and become permanent residents of Canada by way of spousal (3.4) or fiancée visas (3.5).

3.4 Conditions Relating to the Status of Spouse of a Consumer-Husband in Canada

Some brides marry their consumer-husbands in their home countries before immigrating to Canada. Obtaining a spousal visa for a mail-order bride raises issues about the definition of a spouse (3.4.1), the validity of a foreign marriage (3.4.2), the invalidity of a foreign marriage (3.4.3), marriages of convenience (3.4.4) and the very young wife (3.4.5).

3.4.1 Definition of a Spouse

The *Immigration Regulations, 1978* define a spouse who is a member of the family class as follows: "spouse, with respect to any person, means the party of the opposite sex to whom that person is joined in marriage."[299] The Regulations also declare that "marriage means the matrimony recognized as a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person."[300] The definition is often criticized because it expressly excludes marriages between persons of the same sex and common-law marriages.[301] However, Bill C-31, the proposed new immigration legislation, is intended to change that legislative policy by including same-sex spouses and common-law spouses as members of the family class.[302]

3.4.2 Validity of Foreign Marriage

For the purposes of the *Immigration Act*, a marriage solemnized in the country of emigration is valid insofar as it complies with the laws of the country in which it took place.[303] Thus, according to immigration law, the validity of a foreign marriage is determined by the laws of the country in which the marriage took place.[304] However, as we shall see in the next subsection, for other purposes, in provincial courts the formal and substantive requirements

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299 Section 2(1), *Immigration Regulations, 1978, supra,* note 237. *The Regulation respecting the selection of foreign nationals, supra*, note 238, has no definition of "spouses."

300 *Ibid.*

301 See J.A. TALPIS, *supra*, note 227, pp. 161 and 165; D.B.N. BAGAMBIIRE, *supra*, note 268, p. 16; D. GALLOWAY, *supra*, note 232, p. 145.

302 *Supra*, note 194.

303 Section 2(1), *Immigration Regulations, 1978, supra,* note 237.

304 For example, in *Canada (Minister of Employment and Immigration)* v. *Taggar*, [1989] 3 F.C. 576 (F.C.A.), it was held that the marriage solemnized in India did not comply with the *Hindu Marriage Act* of 1955, since the parties had never been able to prove that there existed in India

for the validity of a marriage may be subject to laws different from those of the place where the marriage took place.[305] For example, in Quebec the essential validity of a marriage is governed by the law of domicile.[306] The onus of proving the existence of a valid marriage, by the production of authentic documents to the federal and provincial immigration authorities, is on the bride and her consumer-husband.[307]

If the sponsorship and visa applications are determined to be acceptable according to the family class criteria, and the validity of the marriage is established, the bride becomes a permanent resident of Canada. Her status is not subject to any conditions. The *Immigration Act* defines a permanent resident as a person who has been granted landing, who has not become a Canadian citizen and who has not ceased to be a permanent resident.[308] Landing means lawful permission to establish permanent residence in Canada.[309]

Section 77 of the *Immigration Act* provides for an appeal of the refusal of an immigration officer or visa officer to accept the consumer-husband's sponsorship application on any ground that involves a question of law or fact, or mixed law and fact,[310] or on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.[311] We should also note that a permanent resident may be subject to various loss of status proceedings in Canada. For example, if she remains outside Canada for an extended period of time, she may be regarded as having abandoned her permanent resident status in Canada.[312] In addition, section 27(1) provides 13 separate grounds that may lead to a deportation order[313] and to cessation of permanent resident status.[314]

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a custom authorizing a woman to marry a man and his brother in succession. Since the custom was an exception to the prohibition of the law, the marriage was declared null and void by the Canadian authorities.

305 D.B.N. BAGAMBIIRE, *supra*, note 268, p. 17.

306 Article 3088(1) C.C.Q., *supra*, note 177.

307 Section 6(2)(a) or 9(3), *Immigration Act, supra,* note 4; s. 6(2)(a), 6(3) or 2(1), *Immigration Regulations, 1978, supra,* note 237; and s. 11, *Regulation respecting the selection of foreign nationals, supra,* note 238. See J.A. TALPIS, *supra*, note 227, p. 162.

308 Section 2(1), "permanent resident," *Immigration Act, idem.* See D. GALLOWAY, *supra*, note 232, pp. 113-14.

309 Section 2(1) "landing," *Immigration Act, idem.* See D. GALLOWAY, *ibid.*

310 Section 77(3)(a), *Immigration Act, idem.*

311 *Ibid.*

312 Section 24, *idem.*

313 Sections 32(2) and (2.1), *idem.*

314 See D. GALLOWAY, *supra*, note 232, pp. 210-33.

3.4.3 Invalidity of a Foreign Marriage

If a marriage is invalid pursuant to the laws of the country in which it took place, the application by the consumer-husband to sponsor the bride will be refused.[315] The bride will be refused entry to Canada because she does satisfy the admission requirements for the family class.

However, the issue of the bride's permanent residence status arises when the bride is already living in Canada and her marriage abroad is determined to have been invalid after she entered Canada. When the parties are acting in good faith, they will do everything possible to satisfy the requirements as to the form and substance of the marriage in the bride's home country. However, a consumer-husband using the MOB process as a pretext for other activities has every interest in contravening the marriage laws in order to contest his responsibilities. A bride who has been deceived in this manner finds herself in an insecure situation, since her permanent resident status depends on the validity of her marriage. In that case, the consumer-husband will be able to threaten to have the bride deported if she complains about the way he is treating her.[316] In these circumstances, the penalties provided for in immigration law are imposed solely on the bride.

Abusive consumer-husbands are rarely subjected to the offences and penalties provided for in the *Immigration Act*.[317] A search of the caselaw reveals that these provisions are seldom invoked in situations involving spouses and fiancées. As a result, consumer-husbands escape punishment.

RECOMMENDATIONS

10. We recommend that the federal authorities apply the sanctions available in immigration law against consumer-husbands who use the MOB trade as a pretext for other activities, such as procuring for the purposes of prostitution.

11. We recommend that federal immigration law prohibit a consumer-husband who has entered into one invalid marriage from submitting a new sponsorship undertaking.

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315 D.B.N. BAGAMBIIRE, *supra*, note 268, p. 18.

316 This possibility was communicated to us in a conversation on July 21, 2000, with Marie-Hélène Paré, *supra,* note 126. She explained to us that some consumer-husbands marry brides in foreign countries knowing that these marriages will not be recognized in Canadian law. They are, therefore, not married. They use this method to supply women to the prostitution rings that they operate. They keep the bride in fear of being deported since her permanent resident status depends on the validity of the marriage.

317 Part VI, *Immigration Act*, *supra*, note 4.

3.4.4 Marriages of Convenience

A wife who has entered into a marriage of convenience is not a "member of the family class" within the meaning of the Act, and thus is an illegal immigrant. The purpose of section 4(3) of the *Immigration Regulations, 1978* is to combat marriages of convenience. It states: "The family class does not include a spouse who entered into the marriage primarily for the purpose of gaining admission to Canada as a member of the family class and not with the intention of residing permanently with the other spouse." This situation may end in the annulment of the marriage, but an immigration officer has the discretion to decide whether a marriage is one of convenience or is "genuine."[318] We shall see later the effects of annulment and divorce proceedings on the bride's immigration status.

In the case of a marriage of convenience, intention is assessed on the basis of two factors: (1) the marriage was for the purpose of gaining admission to Canada; and (2) there was no intention to reside permanently with the Canadian husband.[319] Only the bride's intention, and not that of the consumer-husband, must be taken into consideration by the immigration officers.[320] Some experts consider this exclusion exceptional because the two factors must both be present.[321] Others regard this interpretation of the legislation and caselaw to be erroneous. According to the latter, proof of one factor is sufficient to establish that the marriage is one of convenience.[322]

In the case of a marriage of convenience, the sponsorship of the bride by the consumer-husband will be rejected. The bride cannot be admitted into Canada because she does not satisfy the criteria for the family class.

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318 *Ellis* v. *Canada (Minister of Employment and Immigration)*, (1994) 27 *Imm. L.R.* (2d) 124 (F.C.T.D.).

319 See in particular *Horbas* v. *Canada (Minister of Employment and Immigration, supra*, note 20. In *Law* v. *Canada (Minister of Citizenship and Immigration)*, *supra*, note 54, the application for a spousal visa was refused because the visa officer concluded that the marriage was one of convenience. The husband had chosen his bride through a Chinese friend who had shown him photographs of her friends in China so that he could choose a wife. The evidence showed that after corresponding for a few months, the husband spent a week in China. He met his wife on November 20 or 21, married her on November 22, and returned to Canada on November 26. He went to visit her again in March of the following year. The wife stated that she had looked for a husband in order to be able to immigrate to Canada and sponsor her family. The fact that the bride sent photographs of herself to her cousin in Canada before the husband had expressed his desire to meet a Chinese wife was considered evidence of her intention to find a husband in Canada. The testimony of the husband and wife was contradictory and lacked credibility. The contradictions in the wife's testimony led to the conclusion that she did not intend to reside permanently with the husband.

320 D.B.N. BAGAMBIIRE, *supra*, note 268, p. 17.

321 J.A. TALPIS, *supra*, note 227, p. 165.

322 D.B.N. BAGAMBIIRE, *supra*, note 268, p. 17.

Characterization of a marriage as one of convenience does not violate section 7 of the *Canadian Charter of Rights and Freedoms*,[323] which guarantees the right to liberty, or section 2(e) of the *Canadian Bill of Rights*,[324] which provides the sponsor with the "right to a fair hearing."[325] The bride does not enjoy the right to a fair hearing.[326]

3.4.5 The Very Young Wife

Finally, the flourishing MOB trade raises the question of the validity of a marriage abroad involving a very young wife who is still a minor. For example, in *Awada* v. *Ministère des Relations avec les citoyens et de l'Immigration*,[327] the Quebec review board affirmed the decision of the Quebec Minister of Citizen Relations and Immigration to reject the sponsorship application of a 28-year-old consumer-husband following his marriage in Lebanon to his 13-year-old wife.[328] The review board, like the Minister, considered the sponsorship of such a young wife to be contrary to public order. In our opinion, this is the position that should be taken. Canada should not allow the tremendous vulnerability of a girl who is still a minor to be exploited through Canadian immigration legislation. The *Immigration Regulations, 1978* now state: "The family class does not include a spouse who is less than 16 years of age."[329] We recommend that the minimum age for eligibility for membership in the family class as a spouse be raised from 16 to18 years. A young married woman will thus be able to continue to enjoy the comfort and support of her family and her friends, in her own culture, until the age of 18. An older bride will be better equipped to deal with her new life in her adopted country. Our concern is to limit the dependence and vulnerability of extremely young immigrant wives.

RECOMMENDATION

12. We recommend that the *Immigration Regulations, 1978* be amended to exclude from the family class a spouse who is under 18 years of age when the sponsorship application is submitted.

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323 Part I of the *Constitution Act, 1982, Schedule B, Canada Act, 1982*, c.11 (U.K.).

324 8-9 Eliz. II, c. 44; R.S.C. (1985), App. III.

325 See *Horbas* v. *Canada (Minister of Employment and Immigration)*, *supra*, note 20.

326 Section 2(e), *Canadian Bill of Rights, supra,* note 324; *Horbas* v. *Canada (Minister of Employment and Immigration), ibid.* See also D.B.N. BAGAMBIIRE, *supra*, note 268, p. 18. See also *Rajpaul* v. *Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 157 (F.C.A.) on marriages of convenience.

327 Bureau de révision de la citoyenneté et de l'immigration, file No. 97-1-1-1004, District of Montréal, decision BRI 97-042, cited in J.A. TALPIS, *supra*, note 227, p. 170.

328 The Minister based the refusal on section 19(a) of the *Regulation respecting the selection of foreign nationals, supra*, note 238.

329 Section 4(3.1), *Immigration Regulations, 1978, supra*, note 237.

3.5 Conditions Relating to the Status of Fiancée of a Consumer-Husband in Canada

A fiancée wishing to immigrate to Canada may be granted permanent resident status. However, her status is much more precarious than that of a wife, because it is conditional on marrying the consumer-husband within 90 days of her arrival in Canada and producing proof that the marriage has taken place. Consequently, a mail-order bride entering Canada on a fiancée visa is at the mercy of the consumer-husband for the initial 90-day period. Her ability to remain in Canada and her permanent resident status depend on him. In addition, immigration officers are much more demanding and suspicious when examining the evidence needed for obtaining a fiancée visa than they are in the case of a spousal visa, because fiancée status will automatically confer permanent resident status without the commitment existing in a marriage. In our opinion, it is important to restrict the power of control that consumer-husbands have over their fiancée-brides. Hence, we propose the removal of the condition of marriage for obtaining a fiancée visa to reduce the subordination and dependence of the fiancée-bride in her relationship with her consumer-husband. In this subsection, we shall examine the general rules governing fiancée visas (3.5.1), the conditions attached to the fiancée visa (3.5.2), and marriages of convenience (3.5.3). We conclude this analysis by proposing the elimination of the condition of marriage for obtaining a fiancée visa.

3.5.1 General Rules

We should mention first that the provisions of the *Immigration Regulations, 1978* relating to fiancées are worded entirely in the feminine form, unlike the rest of the Regulations.[330] This detail exposes the true nature of marital agreements made for the purpose of enabling brides to immigrate for the benefit of a Canadian citizen or permanent resident. The feminine wording of the Regulations appears to exclude cases in which Canadian women become engaged to or marry men who are not Canadian citizens.

When the immigration application is made, the sponsorship of the bride depends on the validity of the proposed marriage according to the law of the province where the spouses intend to reside after their marriage.[331] Pursuant to section 6(1)(d) of the *Immigration Regulations, 1978*,[332] the validity of the proposed marriage, in the case of a sponsorship of a fiancée, is governed by the law of the province of residence after the marriage takes place. The visa officer must be convinced that the consumer-husband and the bride intend to live together on a permanent basis after they are married.[333] The visa officer must also conclude that the engagement was not primarily for the purpose of allowing the bride to become eligible to immigrate to Canada.[334] The intent of both parties must be assessed with regard to

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330 However, s. 2(1) of the *Immigration Regulations, 1978, idem,* specifies that the term "fiancée" includes a fiancé.

331 Section 6(1)(d)(ii), *idem.*

332 *Ibid.*

333 D.B.N. BAGAMBIIRE, *supra*, note 268, p. 25.

334 *Idem*, p. 26.

each of these elements.[335] In making the decision, the visa officer examines a number of factors, such as the length of the relationship, correspondence, telephone calls, gifts exchanged by the parties, the number of times they met, their ability to communicate with each other, their meetings with each other's families, engagement celebrations and marriage plans, and the sincerity and credibility of the testimony not only of the engaged couple but also of their friends and family members.[336] All these factors are assessed on the basis of documentary evidence, such as, for example, correspondence between the engaged couple and telephone bills, as well as oral evidence. The caselaw indicates that visa officers view applications for landing by fiancées with suspicion, and do a detailed check of the couple's story because of the possibility of fraudulent marriages. Section 77 of the *Immigration Act* provides for an appeal from a refusal by a visa officer of a consumer-husband's sponsorship application on any ground that involves a question of law or fact, or mixed law and fact,[337] or on the ground that there exist humanitarian considerations that warrant the granting of special relief.[338]

3.5.2 Conditions Attached to the Fiancée Visa

An immigration officer imposes mandatory conditions on the bride, upon her entry into Canada, in order for her to be able to exercise her right to be landed in Canada. Section 23.1(2) of the *Immigration Regulations, 1978*[339] provides that the marriage must take place within a period of 90 days after the date the fiancée entered Canada. The couple must then provide evidence of fulfilment of the immigration conditions, i.e., that the marriage took place within 90 days of the date of the bride's arrival in Canada, at times and places

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335 See *Chmilar* v. *Canada (Minister of Citizenship and Immigration), supra,* note 154; *Shandraseharam* v. *Canada (Minister of Citizenship and Immigration),* [1999] I.A.D.D. No. 43 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.) on the refusal of a fiancée visa in the case of a marriage arranged with a bride in Sri Lanka.

336 See *Horbal* v. *Canada (Minister of Citizenship and Immigration), supra,* note 53; *Chmilar* v. *Canada (Minister of Citizenship and Immigration), ibid.*; *Freitas* v. *Canada (Minister of Citizenship and Immigration), supra* note 158; *Shandraseharam* v. *Canada (Minister of Citizenship and Immigration), ibid.*; *Hunsberger* v. *Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D. No. 1498 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.); *Daoust* v. *Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D. No. 1272 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.); *Buttar* v. *Canada (Minister of Employment and Immigration)*, [1991] I.A.D.D. No. 73 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.).

337 Section 77(3)(a), *Immigration Act, supra,* note 4. See *Shandraseharam* v. *Canada (Minister of Citizenship and Immigration), ibid.*

338 Section 77(3)(b), *Immigration Act, idem.*

339 See *supra,* note 237.

specified by the immigration officer.[340] Thus, the permanent resident status of a mail-order bride is contingent on fulfilment of these two conditions.

If the couple fails to fulfil these conditions, a report pursuant to section 27 of the *Act* must be sent by the immigration officer or peace officer to the Deputy Minister, alleging the contravention by the bride of the conditions of landing. A bride who has failed to comply with the conditions of her fiancée visa will lose her lawful permanent resident status and become an illegal immigrant. If, at the conclusion of an inquiry, an adjudicator reaches a decision unfavourable to the bride, an exclusion order may be issued against her.[341] In *Gabriel* v. *Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal held that factors making it impossible for the marriage to have taken place should not be considered. Inability to marry amounted to failure to comply with the condition attached to the visa.[342] However, it should be noted that pursuant to the Act[343] and the Regulations,[344] a fiancée can make an application to vary the terms and conditions attached to her visa, after entering Canada.[345] In short, the consequences of the marriage's not taking place within 90 days after her entry into Canada, or not taking place at all, affect only the bride.

Section 70 of the *Immigration Act* provides for an appeal of a removal order on a question of law or fact, or mixed law and fact.[346] An appeal may also be based on the ground that, in view of all the circumstances, the bride should not be returned to her home country.[347] For

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340 *Ibid.*

341 Section 32, *Immigration Act*, *supra*, note 4. See D. GALLOWAY, *supra*, note 232, pp. 227-28.

342 (1984) 60 N.R. 108 (F.C.A.), cited in D. GALLOWAY, *idem*, p. 148.

343 Section 15, *Immigration Act*, note 4.

344 Section 24, *Immigration Regulations, 1978*, *supra*, note 237.

345 In *Aujla* v. *Canada (Minister of Citizenship and Immigration)*, (1991) 13 *Imm. L.R.* (2d) 81 (F.C.A.), cited in D. GALLOWAY, *supra*, note 232, p. 237, the Federal Court of Appeal decided that the fact that a fiancée was not advised of the possibility of varying the terms and conditions was relevant in deciding on her failure to discharge her obligation to marry within 90 days of her entry into Canada.

346 Section 70(1)(a), *Immigration Act, supra*, note 4.

347 Section 70(1)(b) of the *Immigration Act, idem,* states: ". . . on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada." This paragraph grants a discretionary power to the members of the Immigration and Refugee Board of Canada. In the case *Vinayagarasa* v. *Canada (Minister of Citizenship and Immigration),* [1998] I.A.D.D. No. 2079 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.), the Immigration and Refugee Board of Canada granted the appeal of a woman who was swindled by her fiancé, to whom her father had paid C$10,000 as a dowry. As the fiancé had absconded with the money and married another woman, the condition that the marriage take place within 90 days was impossible for the bride to satisfy. The violent conflicts raging in Sri Lanka, as well as arrests and corruption, were considered as circumstances militating against sending the woman back to

our purposes, it is important to note that section 70(1)(b) of the *Immigration Act* allows for deportation to be avoided in special circumstances. For example, in *Pokuaah* v. *Canada (Minister of Citizenship and Immigration)*,[348] a Ghanaian woman entered Canada on a fiancée visa. She refused to marry her fiancé because he abused her physically, mentally and emotionally. She fled to a shelter for battered women and filed a complaint with the police. The immigration authorities summoned her to a hearing because she no longer met the conditions of her fiancée visa. She attended voluntarily, and the adjudicator issued a departure order. She did not comply with the order, which was then followed by a deportation order. On appeal, the Board member found that the orders met the requirements of the Act but he allowed the immigrant to remain in Canada, invoking equitable jurisdiction under section 70(1)(b) of the *Immigration Act*. In his decision, the member seems to have been particularly impressed by the fact that the appellant had complied with the Act and had not tried to evade immigration authorities, and he found it perfectly understandable that she would refuse to marry a violent man. This equitable remedy, although unpredictable, provides a particularly promising avenue for a bride with a fiancée visa who is a victim of violence at the hands of her consumer-husband. It is important, however, for her to avoid doing anything illegal and to demonstrate her compliance with Canadian law.

There is an ongoing debate in the caselaw as to whether or not a fiancée-bride may benefit from the equitable jurisdiction of the Immigration Board to which a spouse is entitled.[349]

3.5.3 Marriages of Convenience

Unlike a spouse, a fiancée who has undertaken to marry for convenience remains a "member of the family class" within the meaning of the Act.[350] If the immigration officer does not believe that the marriage is genuine, the process of sponsorship of the bride by the consumer-husband is interrupted. The bride must then return to her home country.

On the other hand, there are no repercussions for the consumer-husband because the marriage never took place. This is a blatantly inequitable situation, in that the bride's situation depends entirely on her consumer-husband's good will. The bride is taking a considerable risk by leaving her home country, uprooting herself and moving far away not only from her family but also from her culture and language. Upon her arrival in Canada, she finds herself at the mercy

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her country. The Board examined the dangers and hardship awaiting the bride in her country of origin.

348 [1996] I.A.D.D. No. 615 (Immigration and Refugee Board of Canada, Immigration Appeal Board) (Q.L.).

349 D.B.N. BAGAMBIIRE, *supra*, note 268, pp. 26-27.

350 On the distinction between the remedies available to the bride-wife and the bride-fiancée, see D. GALLOWAY, *supra*, note 232, pp. 148-49. However, this distinction was rejected in *Dhaliwal* v. *Canada (Minister of Citizenship and Immigration)*, (1988) 5 *Imm. L.R.* (2d) 265 (Immigration and Refugee Board, Immigration Appeal Board).

of the man who has applied for her to immigrate. He alone has the power to enable the bride to immigrate or not. Moreover, as we have seen, some experts have pointed out that there are consumer-husbands who initiate multiple sponsorships.[351]

As we shall see in the next section, we propose eliminating the condition of marriage for fiancée visas, so that brides, like wives, can enjoy permanent resident status. Nonetheless, we are of the opinion that federal immigration law should provide for the prosecution of unscrupulous consumer-husbands and compensation to brides for the harm they have suffered.

RECOMMENDATION

13. We recommend the creation in federal immigration legislation of a remedy for a bride against her consumer-husband for abuse of the sponsorship process. The purpose of this remedy would be to compensate the bride for damages she has suffered. The remedy would encourage brides to institute proceedings against people who participate in trafficking in women.

3.5.4 Removal of the Condition of Marriage for Obtaining a Fiancée Visa

Unlike a spousal visa, the condition of marriage on a fiancée visa places a bride in a precarious and vulnerable position in her relationship with the consumer-husband. The threat of deportation as a consequence of failing to fulfil the condition of marriage obliges the bride to comply with her consumer-husband's every wish. Thus a fiancée visa subordinates the bride to her consumer-husband by making her permanent resident status conditional upon marriage. Moreover, fiancée visas are the only ones in the family class to make permanent residence subject to the fulfilment of a condition.

We recommend the elimination of the condition of marriage attached to a fiancée visa, first of all to limit the power of the consumer-husband over the bride and thus reduce the aspect of subordination in their relationship. Next, our intention is to promote the same treatment for a fiancée-bride as that reserved for all other members of the family class by granting her immediate permanent residence in Canada.[352] Finally, we are of the opinion that the bride should not be forced to submit to abusive behaviour on the part of a Canadian citizen in order to remain in Canada.

Fears of an increase in the number of fraudulent immigration applications as a result of eliminating the condition of marriage are unfounded. In fact, we have already noted that immigration officers are more demanding and scrupulous about granting fiancée visas than spousal visas. Furthermore, the profile of a mail-order bride in the first part of our study suggests that she will choose to get married anyway because of her religious beliefs. On the

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351 See D. HUGHES, *supra*, note 42, p. 43.

352 We wish to thank Avvy Go, lawyer at the Metro Toronto Chinese and South East Asia Legal Clinic, and Professor Jean-Pierre Derriennic of the Department of Political Science, Université Laval, for the stimulating conversations we had with them on this subject.

other hand, the balance of power between the fiancée and the consumer-husband might shift in the bride's favour, since she will be able to refuse to get married in response to any demands or threats of deportation made by her fiancé. In effect, a fiancée-bride would enjoy permanent resident status in Canada, regardless of whether she decided to marry her consumer-husband or not should he behave abusively toward her. Finally, as is the case for a spouse in the event of a marriage breakdown, the consumer-husband would still be required to fulfil his sponsorship undertakings in respect of his fiancée-bride, even if the marriage did not take place.

In conclusion, the legislative changes in Bill C-31[353] also support this recommendation. It seems inequitable to keep a fiancée visa conditional on a marriage's taking place when the federal government is preparing to recognize same-sex and opposite-sex common-law spouses as members of the family class.

RECOMMENDATION

14. We recommend that the federal government eliminate the condition of marriage for obtaining a fiancée visa so that a bride can obtain permanent residence in Canada when her visa is issued.

3.6 Prohibition of Multiple Sponsorships

We have seen that some consumer-husbands sponsor more than one bride as a fiancée or spouse over the course of a lifetime. Some of them repudiate a bride when she does not satisfy their need for control. Others use immigration law to procure women for prostitution rings or other criminal purposes. Therefore, we believe it necessary to prohibit serial sponsorships, except in exceptional cases such as divorce or the death of the bride, following an investigation into the first marital relationship.

RECOMMENDATION

15. We recommend that federal immigration law provide that a man may not sponsor more than one spouse in his lifetime, unless humanitarian reasons justify an exception in the case of divorce or the death of his wife, following an investigation into the first marital relationship.

3.7 The U.S. Model

Our report deals only with Canadian law. However, we think it necessary to look briefly at the U.S. model, which illustrates the disastrous consequences of conditional resident status of the bride and the control over her granted to the consumer-husband.

Like Canada, the United States regulates the MOB industry primarily through its immigration law. In recent decades, the United States Congress has enacted legislative changes to combat

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353 *Supra*, note 194.

fraudulent marriages. In 1986, the *Immigration Marriage Fraud Amendments*[354] created a conditional residence scheme. The consumer-husband applies for a spousal or fiancée visa. As in Canada, the fiancée-bride must marry her consumer-husband within three months of her arrival in the United States. However, the spouse or fiancée has conditional resident status for a period of two years only. After that period, the consumer-husband and the bride must make a joint application for permanent resident status for her. Because of administrative delays, that period may be as long as four years.[355] Permanent resident status is granted after an interview with immigration officers, who do not hesitate to ask intimate questions to determine whether the marriage is genuine[356]. Conditional resident status is generally denounced for keeping the bride dependent on the consumer-husband for many years. In addition, the consumer-husband wields a great deal of power over her since he can threaten to have her deported at any moment.[357]

In 1990, following the recommendations of a committee on spousal violence inflicted by U.S. citizens against foreign spouses, a legislative amendment was passed to enable brides to seek to be exempted from the joint application and be granted permanent resident status on the grounds that their consumer-husband had assaulted them or subjected them to extreme cruelty.[358] The burden of proof required by these new statutory provisions was too heavy.[359]

In fact, in 1994, the U.S. Congress acknowledged that the 1990 statute was insufficient to free a bride from the yoke of a consumer-husband. It enacted the *Violent Crime Control and Law Enforcement Act*.[360] The Act allows a bride to apply to be exempted from the requirement of filing a joint application for permanent resident status if she proves her good character, her good faith in getting married, the battering or extreme cruelty to which she and her children are subjected by the consumer-husband, and the extreme hardship that would result if she were deported to her country of origin. These new amendments have been criticized for the vagueness of the standards used by the Act, and the resulting difficulty of proving that they have been met. In addition, the requirement for expert evidence makes this remedy unrealistic for brides.[361]

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354 Pub. L. No. 99-639, 100 Stat. 3537 (1986).

355 R. SCHOLES, *supra*, note 7, p. 11.

356 See C. CHUN, *supra*, note 1, p. 1193; R. SCHOLES; *idem*, p. 11, and E. Meng, *supra*, note 2, p. 214.

357 See C. CHUN, *idem*, pp. 1193-95; R. SCHOLES, *ibid.*; and E. MENG, *idem*, pp. 212-19.

358 *Immigration Act of 1990*, Pub. L. No. 101-649, s. 701(a), 104 Stat. 4978 (1990).

359 C. CHUN, *supra*, note 1, p. 1197.

360 Pub. L. No. 103-322, 108 Stat. 1796 (1994).

361 E. MENG, *supra*, note 2, pp. 218-20, and C. CHUN, *supra*, note 1, pp. 1200-1201.

Finally, in 1996, the U.S. Congress enacted section 652 of the *Immigration Reform and Immigrant Responsibility Act*,[362] dealing specifically with the MOB industry. The Act requires that MOB agencies disclose information about immigration laws and procedures to the brides they recruit. It provides for fines of up to US$20,000 for failure to comply. It also authorizes the Attorney General to undertake a study of the mail-order bride phenomenon.

In short, the U.S. system of conditional residence subjects the bride to the control of her consumer-husband, who may keep her in a slavery-like state by brandishing the threat of deportation.[363] Consequently, we conclude that United States law should not serve as a model in this area.

4 The Law of Marriage

Mail-order brides immigrate to Canada as members of the family class through marriage. As we saw earlier, two possible situations may arise. First, a bride may enter Canada as the spouse of a Canadian citizen pursuant to a sponsorship in the family class after being married in the country from which she is emigrating (4.2). Second, a bride may immigrate to Canada as the fiancée of a Canadian citizen. Her fiancée visa requires her to marry the consumer-husband in Canada within 90 days of her entry into the country (4.3). However, a marriage may present problems since the requirements for a valid marriage in immigration law (which we examined in the preceding subsection) differ from those in private international law. Finally, the former action for breach of promise of marriage is a potential avenue of recourse for a bride who enters Canada on a fiancée visa (4.4). However, it is important to clarify the issue of the division of powers in this regard (4.1).

4.1 Division of Powers

The provinces have the jurisdiction to enact legislation in relation to private international law within their fields of legislative competence. According to constitutional authors Henri Brun and Guy Tremblay:[364]

> [TRANSLATION] Private international law allows the resolution of problems involving elements foreign to the jurisdiction in question, but fundamentally it is only useful for internal purposes, i.e., determining which laws apply on private territory.

Combined with their exclusive power in relation to property and civil rights,[365] this principle allows the provinces to legislate on the formal requirements of marriage with respect to the conflict of laws. While the federal Parliament has the exclusive power to legislate in relation to

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362 *Supra*, note 112.

363 E. MENG, *supra*, note 2, p. 220.

364 See H. BRUN and G. TREMBLAY, *supra*, note 226, p. 572.

365 Section 92(13), *Constitution Act of 1867*, *supra*, note 174.

marriage and divorce,[366] the task of legislating in relation to the solemnization of marriage within a province nonetheless falls to the provincial legislatures.[367] As a result, Parliament has exclusive jurisdiction to establish the substantive requirements of marriage,[368] while the provincial legislatures may define the formal prerequisites for marriage.[369]

It is therefore important to examine the principles of the conflict of laws in Quebec civil law and in the common law of the other provinces of Canada with regard to the recognition of foreign marriages. For the purposes of this report, we shall summarize the general requirements for the validity of a marriage as well as the rules of private international law.

4.2 *Marriage in the Bride's Country*

Private international law regulates the validity of foreign marriages. However, the law of the province of Quebec and that of the common law provinces are similar enough to be analysed together. The validity of such marriages is assessed on the basis of substantive (4.2.1) and formal (4.2.2) requirements. We shall define and then give examples of the types of requirements. We shall subsequently describe private international law rules applicable to each.

4.2.1 Substantive Requirements

Substantive requirements determine the legal rules and principles essential to marriage. They revolve around three governing ideas: psychological, physiological and sociological requirements.[370] These include the age of marriage, the free consent of both parties, prohibitions on marriages between persons related by consanguinity and marriage, prohibitions on marriage on the grounds of the health or religion of one of the future spouses, polygamous marriages, marriage between persons of the same sex, common-law spouses, and remarriage preceded by a foreign divorce.

Among the substantive requirements, that of consent to the marriage poses a thorny problem in the case of mail-order brides. Consent to the marriage becomes an issue if the representations made by the consumer-husband do not correspond with reality. The bride's consent to the marriage must be free and informed.[371] However, to convince the bride to marry him, the consumer-husband has courted her. He has painted a glowing picture of marital bliss. He has made promises about the future awaiting her in her adopted country.

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366 Section 91(26), *idem.*

367 Section 92(12), *idem.*

368 This power is evidenced, in particular, by the enactment of the *Marriage (Prohibited Degrees) Act*, S.C. 1990, c. 46.

369 See H. BRUN and G. TREMBLAY, *supra*, note 226, p. 197.

370 See Mireille D. CASTELLI and Éric-Olivier DALLARD, *Le nouveau droit de la famille au Québec*, Sainte-Foy, Quebec: P.U.L., 1993, p. 11, and *Canadian Family Law Guide*, Vol. 3, Don Mills, Ontario: CCH Canadian Ltd., 1976, No. 1010.

371 See, for example, the *Convention on Marriage, Minimum Age for Marriage, and Registration of Marriages*, 521 U.N.T.S. 231, in force December 9, 1964.

In his speech and his letters he has also given a rosy picture of his living environment, his status, his personality and his way of life. Moreover, as we have seen, while it is the practice of mail-order bride agencies to inform the consumer-husband about the bride, she knows very little about him. Finally, the way in which this business is conducted rarely gives the bride the opportunity of knowing what kind of consumer-husband will be hers. What if, despite his fine words, he is in fact planning to keep her in a state of subservience or to force her into prostitution? The problem is complex because the legality of the bride's immigrant status and the consumer-husband's sponsorship undertaking depend on the validity of the marriage. A marriage can be annulled for lack of consent. Later, we shall analyse the consequences of marriage breakdown for the bride, including annulment and divorce proceedings.

In principle, the substantive requirements of the law of the place where the marriage takes place must be fulfilled in order for the validity of a marriage outside Canada to be recognized in Canada. This general rule applies in most countries.[372] However, in private international law, there are two conflicting schools of thought with respect to the rules governing the validity of a marriage solemnized in a foreign country. While the first favours the "dual domicile doctrine," according to which the validity of the marriage is assessed pursuant to the laws governing each of the parties prior to the marriage, the second advocates taking into account the law of the intended domicile of the spouses.[373] Castel explains the rationale underlying each of the two doctrines:[374]

> The dual domicile doctrine has the advantage of preserving the equality of sexes. On the other hand, the intended matrimonial home doctrine recognizes that the community in which the parties plan to live together as husband and wife is primarily interested in the validity of their marriage.

The common law provinces prefer the first solution, according to which the validity of the marriage is assessed on the basis of the national laws of each of the parties.[375] Similarly, in Quebec, the substantive requirements for the validity of a marriage depend on the law of the domicile of each of the future spouses. Article 3088(1) C.C.Q. states:

> Marriage is governed with respect to its essential validity by the law applicable to the status of each of the intended spouses.

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372 See J.A. TALPIS, *supra*, note 227, p. 145, note 13, where the author mentions that the law of the place where the marriage takes place prevails in the Scandinavian countries, in several countries in Latin America and in the United States.

373 See J.-G. CASTEL, *supra*, note 176, p. 359, No. 215.

374 *Ibid.*

375 *Idem*, p. 360, No. 215.

Thus, when the spouses have different domiciles at the time the marriage takes place, as in the case of an MOB, each is still subject to his or her own law. Each of the future spouses need not satisfy the requirements of the law of the domicile of the other future spouse.[376] In applying this principle, Quebec legal discourse and caselaw distinguish between unilateral impediments, in which case only the personal law of the spouse applies, and bilateral impediments, in which case the law of the domicile of each of the spouses applies cumulatively.[377]

In principle, the common law provinces recognize the substantive requirements for the validity of a marriage imposed by a foreign country. Nevertheless, the provinces refuse to find a marriage invalid for violating a requirement of a foreign law which is contrary to public order as defined by the provinces, the federal government or international law. For example, Algerian law allows Muslim men to marry non-Muslim women, but denies Muslim women the right to marry non-Muslim men. In Canada, the common law provinces would rely on the *Canadian Charter of Rights and Freedoms*[378] and the *Universal Declaration of Human Rights*[379] to invoke international public order as a basis for recognizing the validity of a marriage in Algeria between a Muslim woman and a non-Muslim man.[380] In Quebec, article 3081 of the C.C.Q. makes specific provision for invoking international public order, as follows:

> The provisions of the law of a foreign country do not apply if their application would be manifestly inconsistent with public order as understood in international relations.

The validity of a foreign marriage depends also on compliance with formal requirements.

4.2.2 Formal Requirements

Formal requirements govern the formalities of marriage. A marriage is valid only if it complies with the formal requirements imposed by the legislator.[381] They include, for example, the need for a marriage to be solemnized by an authorized officiant, rules on publishing the marriage before or during the solemnization, the presence of witnesses, the need for a civil or a religious marriage, obtaining a medical certificate, the requirement for a solemn form, and recognition of the marriage by a government authority. The formal requirements also include rules of procedure, such as the presence of the spouses or the exchange of consent.

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376 See J.A. TALPIS, *supra*, note 227, p. 145.

377 *Idem*, p. 146.

378 Section 15(1), *supra*, note 323.

379 G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

380 See J.A. TALPIS, *supra*, note 227, p. 148.

381 See M.D. CASTELLI and É.-O. DALLARD, *supra*, note 370, p. 30, and *Canadian Family Law Guide*, *supra*, note 370, No. 1075.

The law of the Canadian provinces recognizes the validity of marriages that do not meet the requirements of their own laws. For example, Quebec recognizes the validity of consensual marriages such as Muslim marriages, marriages by proxy or unregistered marriages, even if those marriages are not valid according to Quebec law.

It is a virtually universally practice to link the validity of a marriage to the rule of close connection to the law of the place where the marriage takes place, adopted by the provincial legislatures in Canada.[382] According to that rule, the marriage must comply with the formal rules of the law of the country where it took place in order to be recognized as valid by provincial authorities.
In Canadian law, therefore, the validity of a marriage will be assessed by applying the rule of the *lex loci celebrationis*:[383]

> Without exception, a marriage is formally valid if it complies with the formal requirements of the *lex loci celebrationis* or alternatively, it seems, with its conflict of laws rules for the formal validity of the marriage even though it does not comply with the formal requirements of the law of the parties' domicile or the conflict of laws rules of that law for the formal validity of the marriage. In general, a marriage is invalid if it is invalid under the *lex loci celebrationis* for failure to comply with its rules for the formal validity of the marriage even though it complies with those of the law of the domicile. In other words, in principle, compliance with the *lex loci celebrationis* is imperative and not permissive. [*references omitted*]

In principle, the law of the country where the marriage took place will determine the formal requirements, unless the laws cannot be applied or are deemed to be contrary to Canadian public order. In that case, the validity of the marriage is assessed having regard to the old English common law[384] or article 3081 of the C.C.Q.

In Quebec, as in the rest of Canada, the validity of a marriage will be assessed having regard to the law of the place where it was solemnized. However, in accordance with a legal policy in favour of validity and in favour of marriage, the Quebec legislature introduced a new conflict rule, in article 3088(2) of the C.C.Q.[385] According to it, a marriage that is invalid under the law of the place where it was solemnized could be regarded as valid if it complies with the formal and substantive requirements of the country of domicile or of nationality of

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382 See J.A. TALPIS, *supra*, note 227, p. 140.

383 See also J.-G. CASTEL, *supra*, note 176, pp. 353 and 354, Nos. 207-208. This author provides an excellent analysis of the court decisions where this principle was applied.

384 *Idem*, p. 356.

385 Art. 3088(2) of the C.C.Q., *supra*, note 177 states: "[Marriage] with respect to its formal validity . . . is governed by the law of the place of its solemnization or by the law of the country of domicile or of nationality of one of the spouses."

one of the spouses.[386] In a case of dual nationality, compliance with the laws of one of the two nationalities will be sufficient to pass the test for validity of the marriage imposed by the Quebec legislature.[387] Thus, the Quebec legislature has chosen to broaden the formal requirements for a marriage by recognizing many diverse formalities.

Consequently, while the formal requirements for a valid marriage in the common law provinces depend on the place where the marriage was solemnized, the legislature in Quebec has added to that rule the law of the country of domicile or of nationality of one of the spouses.

Last, neither the *Civil Code of Québec* nor the common law provinces have any conflict of laws rule regarding the law applicable to betrothals. The question of whether a bride in an MOB arrangement could bring an action for breach of promise or for restitution of gifts and donations remains unanswered.[388]

4.3 Marriage in Canada

A marriage in Canada between a consumer-husband, who is either a permanent resident or citizen of Canada, and a bride, who has entered Canada on a fiancée visa, is a marriage between foreign nationals. Consequently, the substantive requirements of the marriage remain subject to the rules set out above in respect of a marriage in the country of the bride. The marriage must comply with the substantive requirements of the laws of the domicile of each of the parties before marriage, unless those rules are contrary to Canadian public order.[389] For example, the validity of the consent is a substantive requirement. Castel explains, "Thus a marriage is invalid if it is invalid under the law of either party's antenuptial domicile on the ground of that party's lack of consent."[390]

A marriage solemnized in Canada must comply with the formal requirements adopted by the Canadian province where the marriage takes place.[391] We have defined and illustrated those requirements in the preceding section. Formal requirements may sometimes vary from province to province in details not relevant for the purposes of this report. Therefore, there is no need to provide an exhaustive description here of the rules in each of the provinces of Canada regarding the validity of a marriage.

4.4 Action for Breach of Promise of Marriage

In this subsection, we shall examine the remedies available to a fiancée-bride when her consumer-husband fails to marry her within the time allowed, or refuses to marry her

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386 See J.A. TALPIS, *supra*, note 227, p. 142.

387 *Ibid.*

388 *Idem*, p. 143.

389 See J.-G. CASTEL, *supra*, note 176, p. 361, No. 219, and art. 3081 C.C.Q., *supra*, note 177.

390 *Idem*, p. 362, No. 221.

391 *Idem*, p. 354, No. 208.

altogether. By delaying or refusing to marry her, the consumer-husband is jeopardizing the bride's immigrant status and causing her substantial harm.

As the term indicates, an action for breach of promise of marriage formerly penalized failure to fulfil a promise to marry. It enabled a fiancée to be compensated for the humiliation as well as the expenses associated with a marriage which never took place. In the present era of equality between the sexes, this outmoded cause of action is disparaged and even prohibited by some provincial legislatures because of its outdated sexism, since it was primarily intended to compensate aggrieved women.

We are proposing here that the former action for breach of promise be revived in the new context of mail-order brides. This cause of action would enable the bride to receive compensation for damages caused by a husband-consumer whose abusive behaviour, violence or refusal to marry jeopardizes the bride's ability to settle in Canada. As we have seen, consumer-husbands suffer few consequences if the bride's efforts to immigrate are unsuccessful. On the other hand, whether or not the bride has a right to settle in Canada, the fact remains that she suffers considerable damages while the consumer-husband acts with impunity. By means of this cause of action, we would like to allow for the awarding of monetary damages against irresponsible consumer-husbands.

In Quebec civil law, breach of promise of marriage could lead to an action in contractual liability by the bride (4.4.2). However, that cause of action seems less accessible to brides residing in the common law provinces (4.4.3). It is important, nevertheless, to first determine the jurisdiction of the Canadian courts as well as the applicable law (4.4.1).

4.4.1 Private International Law

An action for breach of promise of marriage is based on contract in Quebec,[392] as it is at common law.[393]

In Quebec, article 3148(3) C.C.Q. provides that Quebec authorities have jurisdiction where "one of the obligations arising from a contract was to be performed in Quebec." In a case where a bride enters on a fiancée visa, the marriage to a consumer-husband residing in Quebec was supposed to have taken place in Quebec and the promise was broken in Quebec. As to the applicable law, article 3112 of the *Civil Code of Québec* establishes the principle of proximity, which takes into account the law of the country "with which the juridical act is most closely connected." In the case at hand, Quebec law would thus apply.

In common law breach of contract cases, the Canadian courts have jurisdiction at the place where the contractual non-performance occurred, regardless of where the contract was

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392 Article 1396 C.C.Q., *supra*, note 177.

393 Gerald Henry Louis FRIDMAN, *The Law of Contract in Canada*, 4th ed., Scarborough, Ontario: Carswell, 1999, p. 408.

made.[394] Consequently, they have jurisdiction when the breach of the promise of marriage occurs in a province of Canada. As to the applicable law, as we have already seen, pursuant to the doctrine of the proper law, the courts will infer the parties' intention from the circumstances surrounding the formation of the contract.[395] The factors determining a close connection suggest that the law of the Canadian provinces will apply to an action for breach of promise of marriage by a mail-order bride.

4.4.2 Quebec Civil Law

In Quebec, civil and contractual liability have the same legal basis: when someone, through his or her fault, causes injury to a victim, the victim must be compensated. The only difference between liability in civil law and contractual liability is the source of the obligation: in the first case there is no contract between the parties, while in the second there is already a legal relationship (a contract) between them. A promise of marriage is a contract within the meaning of the *Civil Code of Québec*.[396]

Article 1458 C.C.Q. states: "Every person has a duty to honour his contractual undertakings." When a person fails in that duty, he is "liable for any bodily, moral or material injury he causes to the other contracting party and is liable to reparation for the injury."[397] The parties may not "avoid the rules governing liability."[398]

Article 1434 C.C.Q. states that a contract "validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law." The term "law" includes both federal and provincial legislation. Thus, a contravention of one of the provisions of the *Immigration Act*, in Quebec, could be a source of a civil fault.

According to Jean-Louis Baudouin and Patrice Deslauriers,[399] a right of action will not be available for every breach of a promise of marriage:

> [TRANSLATION] A breach of a promise to marry will, in and of itself, not give rise to a claim for damages. For a fiancée or fiancé to have a right of action, the breach must involve fault. Thus it is necessary that the promise was made in an ill-considered manner, and above all, that its retraction was due to caprice, bad faith, rashness, carelessness or was not seriously motivated.

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394 See J.-G. CASTEL, *supra*, note 176, p. 208, No. 127.

395 *Idem*, p. 593, No. 448.

396 Article 1396 C.C.Q., *supra*, note 177.

397 Article 1458(2) C.C.Q., *idem*.

398 *Ibid*.

399 See J.-L. BAUDOIN and P. DESLAURIERS, *supra*, note 192, p. 292, No. 462.

The caselaw confirms that breaches of promises of marriage do not, in and of themselves, entitle a party to damages.[400] Rather, the fault stems from the damage caused. In fact, the breach of a promise to marry for valid reasons, such as lack of affection, will not result in the liability of the person who takes this initiative.[401]

The same authors describe the factors to be considered in assessing compensable damages as follows:[402]

> [TRANSLATION] In addition to material damages (lost wages, expenses in preparation for marriage, etc.), the victim is entitled to moral damages, i.e., for humiliation, anxiety, suffering, the ridicule to which she has been exposed, and the possible decrease in her chances of marriage.

4.4.3 The Common Law in the Other Canadian Provinces

Unlike Quebec civil law, certain common law provincial legislation no longer permits an action for breach of promise of marriage. In Ontario and British Columbia,[403] for example, legislation now prohibits such actions:[404]

> 32.(1) No action shall be brought for a breach of a promise to marry or for any damages resulting therefrom.

Furthermore, "Where one person makes a gift to another in contemplation of or conditional upon their marriage to each other and the marriage fails to take place or is abandoned, the question of whether or not the failure or abandonment was caused by or was the fault of the donor shall not be considered in determining the right of the donor to recover the gift."[405] Consequently, this provincial legislation eliminates any action for moral damages, although

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400 See *Noël* v. *Marcotte*, [1979] C.P. 240; *Santis* v. *Campa*, [1960] S.C. 668; *Iadeluca* v. *Aspri*, [1946] S.C. 370; *Audy* v. *Cantin*, (1939) 77 S.C. 187; *Boucher* v. *Boucher*, (1920) 58 C.S. 468; *Poirier* v. *Trudeau*, (1917) 52 S.C. 405; *Boulet* v. *Goudreault*, (1908) 35 Q.J.R. 244 (C.S); *Walker* v. *Goodman*, (1899) 16 B.R. 466; *Laperrière* v. *Poulin*, (1894) 6 Q.J.R. 353(S.C.); *Demers* v. *Hébert*, (1884) 13 R.L. 466 (S.C.). Cases were dismissed only on procedural grounds.

401 See *Samson* v. *Sohier*, [1944] S.C. 295. See also J.-L. BAUDOUIN and P. DESLAURIERS, *supra*, note 192, p. 293, No. 462.

402 J.-L. BAUDOUIN and P. DESLAURIERS, *ibid.*

403 Section 75, *Family Relations Act*, R.S.B.C. 1979, c. 121. The same situation prevails in Britain pursuant to section 1 of the *Law Reform (Miscellaneous Provisions) Act, 1970*, U.K. 1970, c. 33.

404 *Marriage Act*, R.S.O. 1990, c. M-3.

405 Section 33, *idem*. See *Marcon* v. *Cicchelli*, [1993] O.J. No. 968, (C. J. Gen. Div.) (Q.L.).

it is still possible to recover items purchased in contemplation of marriage.[406] Indeed, the courts have become increasingly resistant to the idea of applying sexist[407] and outdated legal principles to relations between men and women. Mr. Justice McLellan explains this change of attitude in the light of Canada's commitment to equality between the sexes as follows:

> Our modern law is gender-neutral. An action for breach of promise is not gender-neutral when it is based on obsolete stereotypical sexist thinking that "the intended bride has been deprived of the conjugal bliss" and that "to the woman, more especially, it is all important that the relation shall not be put an end to." To allow such an action would perpetuate such archaic sexist notions.[408]

In view of those comments, even in the absence of any provincial legislative intervention, the common law action for breach of a promise of marriage seems to have fallen into disuse due to its sexist nature.

However, this outmoded cause of action could be worthwhile in providing compensation in a new situation and penalizing the abusive behaviour of some consumer-husbands. In the specific context of an immigrant plaintiff whose permanent resident status depends on marriage, we are of the opinion that Canadian courts might show more sympathy for a bride. This cause of action, novel in such circumstances, would serve as a warning and as an incentive to take seriously the undertaking to marry the bride within 90 days following her admission to Canada. It would allow the bride to be compensated for moral damages suffered as a result of a broken engagement. The courts could take into account factors such as the harm suffered by a bride who is in exile from her country (separation from her family and community), humiliation, ostracism from her ethnic community because of the broken engagement, insecurity, fear of deportation and deportation itself, loss of virginity (if applicable, and if it is of significant value in her community), and the loss of hope for a better future.

In conclusion, as in the case of contractual causes of action, a civil action for breach of promise of marriage is not a very realistic option for the bride. Indeed, civil action remains very secondary, since the bride is faced with the fear of deportation. In addition, some

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406 *Marcon* v. *Cicchelli*, *idem*; *Archer* v. *Cornfoot*, (1991) 35 R.F.L. (3d) 182 (C.A. Ont.). The remedy of unjust enrichment nonetheless remains available when the conditions for its application are satisfied.

407 See *Frost* v. *Knight* (1872), L.R. 7 Ex. 111, p. 115-16, referred to in *LeBlanc* v. *Wetmore*, [1944] 2 D.L.R. 130, p. 132 (C.A.N.-B.) and *Dupuis* v. *Austin*, [1998] N.B.J. No. 516 (N.B.Q.B.) (Q.L.), par. 11. To the same effect, see *Coles* v. *Roach*, (1980) 112 D.L.R. (3d) 101 (P.E.I.S.C.), and *Davenport* v. *Miller*, (1990) 70 D.L.R. (4th) 181 (N.B.Q.B.).

408 *Dupuis* v. *Austin*, *idem*, par. 12 and 13. Finally, according to Professor John G. FLEMING, *The Law of Torts*, 8th ed., Sydney, Australia: Law Book Company, 1992, p. 654: "Nowadays, the action bears a distinctly archaic image. The underlying assumption of a husband's proprietary rights in his wife has become obsolete. . . . Sex equality demanded one or other alternative: either to extend the right also to wives . . . or to abolish the action altogether."

provincial legislatures prohibit it. However, given the need to punish the abusive conduct of some consumer-husbands, and to take into account the injury suffered by the bride, revival of the cause of action for breach of promise of marriage is a viable legal option which could be used to advantage in the new context of the MOB trade.

We should note that Recommendation 16 is made in the event that Recommendation 14, concerning the elimination of the fiancée visa, is not adopted.

RECOMMENDATIONS

16. We recommend that federal immigration law be amended to allow a bride to remain in Canada during proceedings for breach of promise of marriage against a consumer-husband who refused to marry her before the expiry of the 90-day time limit after her entry into Canada.

17. We recommend that provincial legislatures reinstate, if necessary, the former cause of action for breach of promise of marriage specifically for mail-order brides.

18. We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use to institute an action for breach of promise of marriage.

5 The Law of Marriage Breakdown and Its Effect on Immigration

In Canada, marriage is a necessary condition for the immigration of a bride in the family class pursuant to the *Immigration Act*. Marriage enables a bride to obtain permanent resident status in Canada and be sponsored by her consumer-husband. What happens when the marital relationship is severed? In this section, we shall examine the rules governing divorce (5.1), annulment (5.2), separation (5.3), as well as support and alimony (5.4), as they relate to immigration law. We shall consider the repercussions of a marriage breakdown on the consumer-husband's sponsorship undertaking as well as the legal recourse available to the bride.

5.1 Divorce Proceedings

Divorce law in Canada falls within federal legislative competence.[409] Thus the same legal principles apply to all Canadian provinces.

A divorce dissolves the marriage of the spouses.[410] The spouses are thus released from the obligations of marriage, except with respect to children.[411] The *Divorce Act*[412] sets out the

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409 Section 91(26), *Constitution Act of 1867* (*supra*, note 174), which lists "marriage and divorce" among the matters within exclusive federal legislative competence.

410 Section 14, *Divorce Act*, R.S.C. (1985), c. 3 (2nd suppl.); R.S.C., c. D-3.4 (hereinafter *Divorce Act*).

conditions for the dissolution of a marriage. Divorce constitutes the breakdown of the marriage, established by one of the following three situations:[413] (*a*) adultery; (*b*) physical or mental cruelty;[414] or (*c*) separation for at least one year. Divorce proceedings initiated by either or both spouses may be for "a divorce alone or together with a child support order, a spousal support order or a custody order."[415]

Before determining the rules of divorce governing a marriage solemnized in Canada or abroad, it is important to determine the court of competent jurisdiction. The *Divorce Act* states:

> 3.(1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.

Since the consumer-husband is, by definition, a permanent resident or a citizen of Canada, in order to have met the sponsorship requirements of the *Immigration Act*,[416] Canadian courts have jurisdiction to hear a divorce action brought by either party.

As for the applicable law, the *Divorce Act* does not include conflict of laws rules. Consequently, private international law applies. For the common law provinces, Castel writes:[417] "Since divorce purports to change the status of the spouses, it is governed by the personal law of the applicant spouse, which is the law of his or her domicile." In Quebec, article 3083 C.C.Q. provides a similar rule: "The status and capacity of a natural person are governed by the law of his domicile." However, another Quebec doctrine leading to the same result as the law of domicile favours the application of *lex fori* to divorce, namely, the law of the court where the proceeding is brought. For the purposes of this report, we make the assumption that the domicile of the consumer-husband was and still is Canada. Consequently, if he institutes divorce proceedings, Canadian law applies. On the other hand, our report deals with the possible remedies available to the bride. By immigrating to Canada and marrying a permanent resident or Canadian citizen, the bride has acquired a new domicile, since she lives

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411 See M.D. CASTELLI and É.-O. DALLARD, *supra*, note 370, p. 348.

412 *Divorce Act, supra*, note 410. In Quebec, see article 516 C.C.Q., *supra*, note 177.

413 Section 8 (2), *Divorce Act, idem.*

414 This is assessed taking cultural factors into account. On this subject, see Jean-Pierre SENÉCAL, *Droit de la famille québécois*, Vol. 3, Farnham, Quebec: FM Éditions, 1985, Nos. 30-690.

415 Section 1, "divorce proceeding," *supra*, note 410.

416 Section 2(1), *Immigration Regulations, 1978, supra*, note 237.

417 See J.-G. CASTEL, *supra*, note 176, pp. 86-89, Nos. 33-37, and art. 76 C.C.Q., *supra*, note 177.

in Canada with the intention of remaining here and making Canada "the seat of her principal establishment."[418] Consequently, the bride would bring her action under Canadian divorce law.

With regard to immigration, divorce changes nothing if, at the time of the marriage, the woman satisfied the requirements for its validity. Good faith must be assumed; i.e., in the absence of evidence to the contrary, there is a presumption that at the time of the marriage, the woman who is now divorced intended to enter into a genuine marriage. The sincerity of the spouses will be assessed with reference to the actions of a reasonable person.[419]

However, a divorce proceeding could be dismissed if the spouses colluded to obtain a divorce pursuant to section 11 of the *Divorce Act*.[420] The collusion to which that section refers relates only to the divorce proceeding, and not to the circumstances surrounding the marriage.[421]

Divorce has no effect on the consumer-husband's sponsorship undertaking. By giving that undertaking, the consumer-husband enters into a contract with the government that exists independently of the marriage relationship. Thus the consumer-husband remains the sponsor of the bride and financially responsible for her, even should the marital relationship be terminated by divorce. In other words, the bride is protected financially and retains her permanent resident status, despite the termination of the marital relationship by divorce.

For legal reasons, we must conclude that a divorce proceeding is a better solution than annulment for a bride who is a victim of breach of trust or a marriage amounting to a form of trafficking. The fact that she retains her permanent resident status after a divorce is certainly an important reason. On the other hand, in many countries there is still a stigma attached to divorce, which may lead to ostracism. A marriage breakdown may also have serious consequences for a bride on the personal level. Hence, her cultural and religious beliefs may sometimes prompt her to seek an annulment.

5.2 Annulment

In Canadian law, a marriage may be annulled when the formal and substantive requirements essential to the validity of the marriage were not met at the time the marriage took place.[422]

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418 *Ibid.*

419 See *Drame* v. *Canada (Minister of Employment and Immigration)*, (1994) 82 F.T.R. 177, cited in Frank N. MARROCCO and Henry M. GOSLETT, *Législation canadienne en immigration : texte annoté*, Toronto: Carswell, 1994, p. 395.

420 See *supra*, note 410.

421 *Droit de la famille-2278*, [1997] A.Q. No. 80 (C.A.) (Q.L.).

422 See M.D. CASTELLI and É.-O. DALLARD, *supra*, note 370, p. 41. See also art. 380 C.C.Q., *supra*, note 177.

An annulment may be obtained, for example, because of a mistaken or false representation as to a person's identity, status or habits. Absence of consent, incompetence, mistake and consanguinity may all be grounds for annulment.[423] Grounds for annulment vary from province to province.[424] In addition, an annulment of a marriage is generally retroactive to the date on which it took place.[425] Finally, it is also important to emphasize that, compared with divorce, the evidence necessary for an annulment is difficult to produce, so that annulments are rarely granted. However, the special case of mail-order brides leads us to believe that annulment is a realistic remedy.

The annulment of a marriage is equivalent to absence of the condition justifying the right of an immigrant bride to enter Canada. That being the case, the bride has therefore never satisfied the requirements of the *Immigration Act*. A bride whose marriage is annulled risks deportation since, without a marriage, she has never fulfilled the necessary condition for obtaining her spousal visa or her fiancée visa. Consequently, the bride enjoys neither permanent resident status nor sponsorship by the consumer-husband. The legal rules on annulment are thus crucial for a mail-order bride, since they determine what her legal status will be in Canada.

Annulment, like marriage, falls within provincial legislative competence. Moreover, we should recall that the requirements for marriage vary, depending on whether the marriage was solemnized in Canada or abroad. Therefore, the law of each province and private international law rules will determine the law applicable to an annulment[426] and also the jurisdiction of the Canadian courts.[427] The law varies from province to province. Also, not all the provinces have adopted conflict of laws rules respecting annulment or the effects of an invalid marriage. For example, the Quebec legislature has not enacted rules on the applicable law for this specific situation.[428] Hence, whether the marriage took place in Canada or abroad, the causes and effects of annulment will be assessed according to the law applicable to the marriage.[429] For the purposes of this report, we shall analyse annulment

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423 On this subject, see the various grounds and related caselaw in L. BÉLANGER-HARDY and A. GRENON, *supra*, note 176, pp. 588-89.

424 See J.-G. CASTEL, *supra*, note 176, p 384, No. 251.

425 See M.D. CASTELLI and É.-O. DALLARD, *supra*, note 370, pp. 54-58, and J.-G. CASTEL, *idem*, p. 383, No. 250.

426 See J.-G. CASTEL, *idem*, pp. 386-87, Nos. 252-53.

427 *Idem*, pp. 384-85, No. 251.

428 See J.A. TALPIS, *supra*, note 227, p. 156. However, another possible interpretation is to apply article 3088 of the C.C.Q., *supra*, note 177 as the conflict of laws rule *a contrario* for annulments. According to this approach, the law of marriage should apply.

429 See J.A. TALPIS, *idem*, p. 156. In general, the applicable law will be determined by the rules of marriage which we analysed in Part II, Section 4. However, see J.-G. CASTEL, *supra*, note 176, p. 386, No. 252.

according to the rules of Canadian civil law, and then common law, applicable to the marriages they govern, following a determination of the jurisdiction of the courts and applicable law for each. Foreign rules on annulment vary from country to country, and are beyond the scope of this report.

To our knowledge, no Quebec cases dealing with annulment directly address the issue of mail-order brides. However, the facts in *I.L.* v. *C.A.*,[430] in the Quebec Superior Court, are similar to those of an MOB situation, and illustrate the vulnerable situation in which brides may find themselves as well as the importance for the bride of avoiding annulment proceedings because of the repercussions for her immigrant status.

In that case, Mr. I. went to Romania with the acknowledged purpose of finding a wife. He met a woman on a train, and the parties married soon after. The couple lived in Romania for several months, and then Mr. I. returned to Canada. He took the necessary steps to bring over his wife. Although separated, the spouses kept in constant contact. Nevertheless, it seems that while Ms. A.'s letters were romantic, Mr. I.'s letters were hostile and vulgar. When Ms. A. arrived in Canada, it was evident from their telephone conversations that the parties did not intend to cohabit. The couple did not live under the same roof. The man was violent toward his wife to the point that he was charged with assault. He sought to have the marriage annulled on the ground that his wife had used him solely for the purpose of immigrating to Canada. Annulment of the marriage would have had the effect of terminating his sponsorship undertaking, and would have resulted in his spouse's being deported. The judge wrote:

> The jurisprudence, as I understand it is that Mr. I. can succeed in his action in nullity of marriage only if he were to establish that his wife had no other interest and no other motive but to use her husband to obtain her admission in Canada.

The judge concluded instead that the applicant had changed his mind even before Ms. A.'s arrival, and was no longer interested in her. As this was not a sufficient ground to justify annulling the marriage, divorce would have been the appropriate remedy in this case. Unlike annulment, a divorce action would have little effect on the bride's immigrant status, since she was acting in good faith. Moreover, as we have already seen, divorce leaves the consumer-husband's sponsorship undertaking intact.

There are many other Quebec decisions to the same effect. They demonstrate the reluctance on the part of judges to grant an annulment when an immigration issue is involved.[431] In fact,

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430 [1996] A.Q. No. 878 (S.C.) (Q.L.).

431 See *X.L.Y.* v. *Z.L.H.*, [1996] A.Q. No. 917 (S.C.) (Q.L.). Ms. X.L.Y., a Canadian of Chinese origin, married a man in China who joined her two years after her return to Canada. She was his guarantor. Upon his arrival, he was cold, distant and violent. She initiated proceedings to have the marriage annulled. Mr. Z.L.H. had married her only to immigrate to Canada. The judge dismissed the action on the grounds that the consent given by the plaintiff was valid at the time of the marriage: the evidence supported it. She was not a victim of a fraudulent

an unconsummated marriage, a sham marriage or a marriage of convenience will not necessarily be annulled, even if it was entered into to obtain the by-products of marriage and not for the marriage itself. On the other hand, judges will annul a marriage where the evidence clearly establishes that the defendant's intention was to marry for the sole purpose of immigrating to Canada.[432]

The common law courts seem to take the same approach as their Quebec counterparts. Indeed, with respect to immigration law, the common law grounds for annulling a marriage are closely related to the concept of fraud:

> [TRANSLATION] In general, if the spouses have conspired together, the courts will refuse to annul the marriage, even if the spouses never had the intention of living as husband and wife, or of cohabiting. In such cases, the courts consider there to have been consent and do not concern themselves with what motivated that consent. *On the other hand, there is a line of cases, which, though not consistent, tend to distinguish situations in which one of the spouses was misled and believed that he or she was entering into a marriage while the other party intended only to obtain a residence permit or citizenship* [*references omitted*]. In any event, the courts seem to wish to discourage such marriages and generally refuse to annul them.[433] [*italics added*]

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marriage by Mr. Z.L.H. to come to Canada since the parties hardly knew each other and took the risk of marrying and getting to know each other afterward. The presumption of good faith in article 387 C.C.Q., *supra*, note 177, was not rebutted and the action was dismissed. See also *Droit de la famille-1280,* [1989] R.D.F. 634 (S.C.). In this case the wife claimed that the marriage was for the purpose of bringing the defendant to Canada because of his deceitful attitude toward her, leading her to believe that he saw in her the mother of his children. The action was dismissed on the grounds that error went to the intention of the person. A divorce proceeding was the appropriate action in this case. In *Narib* v. *Shahwan*, J.E. 78-568 (S.C.), Ms. Narib instituted an action for annulment on the basis of error as to the person. However, she knew why the defendant wanted to marry: his intent was to avoid deportation from Canada by immigration officials. The consent was thus valid at the time of the marriage. There was no evidence of error as to the person. The defendant had always expressed his reasons clearly to her. She thus could not invoke her own failure and the action for annulment was dismissed.

432 See *Droit de la famille-1036*, [1986] R.D.F. 429 (S.C.). An annulment was granted since the defendant married his wife only to be able to reside in Canada. In *Puetter* v. *Singh*, J.E. 78-715 (C.S.), Ms. Puetter had been a victim of intimidation and threats by the defendant of Indian origin, who wanted to settle in Canada. Her consent was thus vitiated and an annulment was granted. In *Lanzetta* v. *Falco*, [1962] C.S. 592, Mr. Falco was an Italian who had married with the sole aim of immigrating to Canada. The Court annulled the marriage on the ground that the consent of the defendant was defective. He had not given a valid consent to the marriage. It should be noted that in these three cases, the defendants were men.

433 L. BÉLANGER-HARDY and A. GRENON, *supra*, note 176, p. 590, footnote 64. See *Abdul-Hussein* v. *Ahmad*, [1982] O.J. No. 970 (Ont. Sup. Court) (Q.L.), and *Ha* v. *Dat,* [1966] O.J. No. 67 (Ont. H.C.) (Q.L.).

In the case of mail-order brides, there are two potential scenarios. First, the bride in good faith marries the consumer-husband, who then seeks to have the marriage annulled. In that case, he will probably be denied the annulment, because evidence of the bride's intention to marry solely for the purpose of immigrating is the only relevant factor. Second, the bride marries and then applies to have the marriage annulled, rather than filing for divorce, in keeping with her religious beliefs. In that situation, annulling the marriage could have very serious consequences for the bride, whose permanent resident status would be open to question. Moreover, Canadian courts generally choose to dismiss annulment proceedings and suggest divorce proceedings instead. Consequently, in order for a bride to retain her permanent resident status, she will have to set aside some of her religious and cultural beliefs in order to obtain a divorce. We are afraid, however, that brides will choose to remain in an abusive situation with their consumer-husbands rather than seek a divorce. We see no justification for the disproportionate consequences of an annulment in the particular case of mail-order brides, in comparison with those of a divorce.

In law, the retroactive effect of an annulment is to call into question the bride's status in Canada. However, in practice, the situation is quite different. We have been informed by officials in the Department of Citizenship and Immigration Canada that an annulment has no effect on the bride's permanent resident status or on the consumer-husband's sponsorship undertaking, inasmuch as landing was not obtained by fraud or misrepresentation.[434]

RECOMMENDATION

19. We recommend that federal and provincial law be amended so that a mail-order bride will not lose her permanent resident status or the benefit of a sponsorship undertaking if her marriage to the consumer-husband is annulled.

5.3 Separation

The provinces determine the rules applicable to separation.[435]

In Quebec, "separation from bed and board" is the appropriate remedy when "the will to live together is gravely undermined" and where there is no impediment to the separation.[436] The courts will grant "separation from bed and board" in three situations: (1) where there is evidence that living together is "hardly tolerable," (2) "where, at the time of the application, the spouses are living apart," and (3) "where either spouse has seriously failed to perform an obligation resulting from the marriage."[437] Unlike divorce and annulment of marriage, separation from bed and board "does not break the bond of marriage."[438] It results in

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434 E-mail of June 26, 2000. No authoritative source was provided to us to verify this statement.

435 Section 92(13), *Constitution Act of 1867*, *supra*, note 174.

436 Article 493 C.C.Q., *supra*, note 177. See Claire BERNARD and Danielle SHELTON, *Les personnes et les familles*, 2nd ed., Vol. 2, Montréal: Adage, 1995, p. 53.

437 Article 494 C.C.Q., *idem*.

"separation as to property" and allows one spouse to be paid support,[439] taking the circumstances into account.[440] Similar principles apply in the common law provinces.[441] In the case of separation, the couple have satisfied the marriage validity requirements necessary for the sponsorship undertaking and for obtaining and retaining the bride's immigrant status. As a permanent resident, the bride is entitled to the same remedies as a Canadian citizen with regard to separation. Consequently, separation is a temporary solution for a bride who has not resolved to seek a divorce because of her beliefs, but does not want to jeopardize her permanent resident status. Furthermore, the fact that the court may also order support and the separation of property assures the bride some financial security.

In Quebec, article 3146 C.C.Q. defines the jurisdiction of the courts in relation to "separation from bed and board": "A Quebec authority has jurisdiction to rule on separation from bed and board where one of the spouses has his domicile or residence in Quebec at the time of the institution of the proceedings." In the other provinces of Canada, the court of the province where the spouses have their domicile generally has jurisdiction.[442] The courts of a common law Canadian province will also have jurisdiction if the spouses have a "family residence" in the province at the time they ceased cohabiting, if the circumstances which resulted in the separation arose in that province, or if the spouses qualified as residents.[443]

As for the applicable law, each province of Canada makes its own rules in the case of separation. In Quebec, for instance, the law of the common domicile of the spouses determines the law applicable to separation.[444] In addition, article 3090 C.C.Q. provides that if "they are domiciled in different countries," the courts will apply "the law of their common residence" or, as a last resort, "the law of the court seised of the case."[445] In the common law provinces, the *lex fori*, that is, the law of the court seised of the case, generally prevails in separation cases.[446]

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438 Article 507 C.C.Q., *idem.*

439 Articles 508 and 511 C.C.Q., *idem.*

440 Article 512 C.C.Q., *idem.*

441 See, for example, in Ontario, section 54 of the *Family Law Act*, R.S.O. 1990, c. F-3. See also *Canadian Family Law Guide*, *supra*, note 370, pp. 18, 71, 284, 669.

442 See J.-G. CASTEL, *supra*, note 176, p. 382, No. 244.

443 *Idem*, p. 383.

444 *Ibid.*

445 Article 3090 C.C.Q., *supra*, note 177. See also H. Patrick GLENN, "Droit international privé," *La réforme du Code civil*, Vol. 3, Sainte-Foy, Quebec; P.U.L., 1993, p. 694.

446 See J.-G. CASTEL, *supra*, note 176, p. 383, No. 248.

5.4 Support

The payment of support derives from the obligation to support, and its purpose is to provide the bride with the necessary means to provide for her basic needs and those of her children, if any.[447] Support may be paid to a bride by the consumer-husband in the event of a separation, annulment or divorce, if the court so orders.

For support to be ordered, the couple must have satisfied the marriage validity requirements necessary for the sponsorship undertaking and for obtaining and retaining of the bride's immigrant status. Hence, the bride benefits from the same remedies as a Canadian citizen in the matter of support. The court having the authority to award support for her and her children is the court that grants the divorce,[448] separation or annulment.

RECOMMENDATION

20. We recommend that the federal and provincial governments inform mail-order brides of their rights with respect to marriage and marriage breakdown.

Up to this point, we have been examining the civil law as it applies to the various aspects of the mail-order bride trade. We shall now briefly consider criminal law provisions that could be invoked to regulate certain illegal activities. In this regard, we shall examine the laws governing spousal violence (section 6) and procuring for the purpose of prostitution (section 7).

6 The Law Governing Spousal Violence

The literature contains numerous examples of abuse by consumer-husbands within the context of a marital relationship, where the bride succeeded in extricating herself from the situation and having her abusive husband charged. It is possible that these authors are presenting only part of the truth by suggesting that all MOB relationships are characterized by abuse. However, while we do not wish to exaggerate the violence, we consider it important to recall that the interaction of the many levels of inequality combined with the vulnerability and isolation of the brides in the first few years after their arrival in Canada, leads to the inference that there are a great number of unreported incidents of abuse.[449]

Criminal law is under federal jurisdiction.[450] The *Criminal Code of Canada* makes spousal violence an offence.[451] However, several factors have the effect of rendering prosecution of

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447 See M.D. CASTELLI and É.-O. DALLARD, *supra*, note 370, p. 260.

448 Section 4, *Divorce Act, supra,* note 410.

449 See R. SCHOLES, *supra*, note 7, p. 8.

450 Section 91(27), *Constitution Act of 1867*, *supra*, note 174.

a consumer-husband for spousal violence an unrealistic option for the bride. Culture and religious beliefs often prevent a woman from complaining about the behaviour of her abusive husband. Furthermore, language difficulties, combined with a lack of financial resources as well as limited access to professionals, make criminal prosecution of a consumer-husband even more impractical for mail-order brides.[452]

The case of a bride on a fiancée visa poses special problems. If she becomes aware of her consumer-husband's abusive and violent nature and, as a consequence, refuses to marry him, she risks being excluded from Canada or becoming illegal. In addition, the long delays involved in a prosecution for spousal violence will prevent her from testifying against the consumer-husband, since she will already have been deported or joined the ranks of illegal immigrants. Her illegal status, in the event that the marriage does not take place within 90 days following her arrival in Canada, makes it impossible to prosecute the consumer-husband, since there would be no witness. In the end, a consumer-husband rejected by a bride will remain unpunished and unidentified. All he has to do is restart the process to find a new bride.

We believe that a bride who is the victim of a criminal act committed by her consumer-husband, such as spousal violence or prostitution-related abuses, should have an opportunity to legalize her situation and remain in Canada even after the criminal proceedings have been completed. She has suffered serious harm at the hands of a Canadian citizen, and she risks further harm if she returns to her home country. Therefore, we propose that a bride bringing criminal charges against her abusive consumer-husband should be granted permanent residence. Such an incentive would make it possible to identify and prosecute consumer-husbands who engage in criminal activities.

It must be noted that Recommendation 23 is made in the event that Recommendation 14, on the elimination of the condition of marriage for obtaining a fiancée visa, is not adopted.

RECOMMENDATIONS

21. **We recommend that federal and provincial immigration authorities investigate each consumer-husband prior to the approval of a sponsorship undertaking and the granting of a fiancée or spousal visa to the bride, in order to identify consumer-husbands likely to engage in criminal activities.**

22. **We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use to provide for their needs for the duration of any criminal proceedings.**

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451 See, for example, sections 151, 152, 222, 264.1, and 265 to 273.2 Cr. Code, *supra*, note 205. The *Criminal Code* sections applicable to spousal violence differ according to the degree of abuse.

452 See generally Dianne L. MARTIN and Janet E. MOSHER, "Unkept Promises: Experiences of Immigrant Women With the Neo-Criminalization of Wife Abuse," (1995) 8 *R.F.D.* 3.

23. We recommend that federal immigration law be amended so that a bride who has been the victim of a criminal act committed by her consumer-husband will be granted permanent resident status while her abuser is being prosecuted.

7 The Law Governing Procuring for Purposes of Prostitution

We have repeatedly mentioned the connections between the mail-order bride trade and prostitution rings. This topic, like the preceding one, is beyond the scope of our report. However, it is important not to pass over it in silence.

We have already denounced serial sponsorship, which may serve as a front for international prostitution rings. In addition, we noted the presence of hyperlinks on MOB Web sites connecting to sites specializing in the promotion of sex tourism. These phenomena, increasingly common with the surge in use of the Internet, are suspect in that they sometimes conceal criminal activities such as procuring for purposes of prostitution. Finally, we deplored the fragile and precarious situation of mail-order brides entering Canada on fiancée visas. However, even brides with spousal visas are not fully protected against prostitution rings.

Section 212 of the *Criminal Code of Canada*[453] prohibits procuring and provides for punishment:

> 212.(1) Every one who:
> (a) procures, attempts to procure or solicits a person to have illicit sexual intercourse with another person, whether in or out of Canada,
> (b) inveigles or entices a person who is not a prostitute to a common bawdy-house for the purpose of illicit sexual intercourse or prostitution;
> (d) procures or attempts to procure a person to become, whether in or out of Canada, a prostitute,
> (f) on the arrival of a person in Canada, directs or causes that person to be directed or takes or causes that person to be taken, to a common bawdy-house,
> (h) for the purposes of gain, exercises control, direction or influence over the movements of a person in such a manner as to show that he is aiding, abetting or compelling that person to engage in or carry on prostitution with any person or generally, . . .
> is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

We believe that mail-order brides should have the time and circumstances necessary to enable them to testify in criminal prosecutions against their assailants. An innovative aspect of the Swiss immigration system has been drawn to our attention. To combat organized crime, Switzerland offers a 45-day visa to a victim of trafficking to decide whether she will

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453 *Supra*, note 205.

go home or file a complaint against the trafficker. The Swiss authorities will renew her visa to enable her to testify.[454]

Canada is a signatory to international treaties designed to combat trafficking in prostitutes on a global scale. Some experts are of the view that while Canada has lived up to its international obligations in relation to drug trafficking by incorporating its undertakings into domestic law, it has neglected to do the same in the matter of prostitution.[455]

We should note that Recommendations 21*, 22* and 23* are made in the event that Recommendation 14, on the elimination of the condition of marriage for obtaining a fiancée visa, is not adopted.

RECOMMENDATIONS

21.* We recommend that federal and provincial immigration authorities investigate each consumer-husband prior to the approval of a sponsorship undertaking and the granting of a fiancée or spousal visa to the bride, in order to identify consumer-husbands likely to engage in criminal activities.

22.* We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use to provide for their needs for the duration of any criminal proceedings.

23.* We recommend that federal immigration law be amended so that a bride who has been the victim of a criminal act committed by her consumer-husband will be granted permanent resident status while her abuser is being prosecuted.

24. We recommend that the federal government take the necessary measures to meet its international commitments regarding prostitution.

In section 8, following, we shall list those aspects of the mail-order bride trade not regulated by law. Finally, in section 9 we shall conclude by proposing that MOB introduction agencies be regulated.

8 Aspects of the Mail-Order Bride Trade Not Regulated by Law

Numerous aspects of the mail-order bride trade remain unregulated. The international nature of the industry makes regulation at a national level particularly difficult, unrealistic and ineffective. In effect, control of this trade necessitates international co-operation.

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454 INTERNATIONAL ORGANIZATION FOR MIGRATION, *supra*, note 71.

455 See generally Jean-Maurice ARBOUR, "Les aspects internationaux de la traite des êtres humains en vue de l'exploitation de la prostitution en droit canadien," in Jacques-Yvan MORIN, ed., *Les droits fondamentaux*, Actes des 1ères journées scientifiques du Réseau, *Droits fundamentaux* de l'AUPELF-URER, Brussels, Belgium: Éditions Bruylant, 1997, p. 411.

The particular phenomenon of mail-order brides remains unregulated in Canadian law. However, we have seen that several areas of Canadian law, both public and private, govern various aspects of the MOB trade. The MOB market remains a free market. The use of the Internet in this business also raises difficult issues in relation to contract law and the civil and contractual liability of the operators of MOB Web sites. Finally, MOB agencies are not subject to any legislative control.

Within the framework of this report, we do not think it appropriate to suggest a comprehensive reform to deal with the MOB phenomenon. Indeed, such an exercise would be futile because of the great complexity of the legal issues raised by this phenomenon, as well as the overlapping of federal and provincial jurisdiction in all areas of the law involved. Nevertheless, we conclude with a specific recommendation for the regulation of mail-order bride agencies.

9 Regulation of Mail-Order Bride Agencies

The recent proliferation of the MOB trade suggests that the number of introduction agencies is multiplying. We do not recommend banning these agencies, which would have the effect of relegating to the black market transactions that it would be preferable to control.[456] However, we believe that MOB agencies operating in Canada must be regulated. Preventive regulatory measures are intended to avoid abuse and protect the brides who are being trafficked.

On the model of the reforms proposed in Chapter 1 of this report with regard to recruiting agencies, we are recommending the regulation of introduction agencies. Thus, provincial regulations would provide for the issuing of a licence to operate an MOB agency. The licence would be granted following an investigation of the applicants and the parties participating and collaborating in this business, as is the case at present for travel agencies. The licence would be conditional on the furnishing of a security to cover any damages caused by dishonest agents. The MOB agency would undertake to investigate the criminal record and marital history of consumer-husbands who subscribe to its services. The agency would have an obligation to disclose the report of the investigation to the bride and the consumer-husband. It would have to keep records containing information about the brides as well as the consumer-husbands. Finally, the agency would also have to inform the bride of her rights and obligations under Canadian law, specifically with regard to immigration law, the law of marriage and marriage breakdown, as well as criminal law.

RECOMMENDATION

25. We recommend that the Canadian provinces take the initiative in specifically regulating mail-order bride agencies operating in Canada in order to limit the abuses in this business and to identify agencies engaged in criminal activity.

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456 See D. HUGHES, *supra*, note 42, p. 43, on the example of the Philippines.

Conclusion

Legal research into the MOB trade calls to mind a labyrinth without an exit. Indeed, the legal framework governing the MOB phenomenon is extraordinarily complex. It raises issues of private and public law. In all areas of law, there is an overlap of federal and provincial legislative competence. In addition, private international law exacerbates the confusion of any legal analysis of the operations generated by the MOB trade. Consequently, the reforms proposed are necessarily restricted to each area of the law and each matter of legislative competence.

The aim of feminist legal research is finding the means and the remedies, as well as proposing reforms, to better protect brides by combatting their isolation and, above all, reducing their dependence in their relationship with their consumer-husbands. In this connection, immigration law is the legal area most likely to achieve this goal. Thus, we have proposed a number of reforms, the most important being the elimination of the condition of marriage for obtaining a fiancée visa. Marriage law, though technical, is fundamental to guaranteeing the validity of a marriage, which is a necessary condition for obtaining and retaining the right of landing for the bride in Canada. Annulment of a marriage, as opposed to divorce, risks unleashing unfavourable consequences for the bride. Therefore, it is important to find solutions to this dilemma since it arises often because of the bride's religious and cultural convictions. Contractual remedies are hardly worthwhile. However, we have suggested reinstating the former contractual remedy for breach of promise of marriage to compensate the fiancée-bride and to hold the consumer-husband responsible for his refusal to marry her. Finally, the criminal law can be used to punish violent consumer-husbands and pimps.

It is important to recall that legal remedies, civil or criminal, will be useless if they are not accompanied by incentive measures to make them practicable. Hence, we have suggested that a legal aid fund be established and measures be taken so that immigrant rights organizations can provide representation and support. We also recommend that a visa and permanent resident status be granted to the bride to enable her to remain in Canada for the duration of any legal proceedings.

Recommendations Concerning the Legal Framework Governing the Mail-Order Bride Industry

7. We recommend that the legal reforms necessary to regulate the MOB trade begin with a joint effort by the federal and provincial governments.

8. We recommend that non-governmental organizations assisting immigrants be granted the necessary funding to help mail-order brides by providing them with information, support and representation in any proceedings.

9. We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use in order to protect their rights.

10. We recommend that the federal authorities apply the sanctions available in immigration law against consumer-husbands who use the MOB trade as a pretext for other activities, such as procuring for the purposes of prostitution.

11. We recommend that federal immigration law prohibit a consumer-husband who has entered into one invalid marriage from submitting a new sponsorship undertaking.

12. We recommend that the *Immigration Regulations, 1978* be amended to exclude from the family class a spouse who is under 18 years of age when the sponsorship application is submitted.

13. We recommend the creation in federal immigration legislation of a remedy for a bride against her consumer-husband for abuse of the sponsorship process. The purpose of this remedy would be to compensate the bride for damages she has suffered. The remedy would encourage brides to institute proceedings against people who participate in trafficking in women.

14. We recommend that the federal government eliminate the condition of marriage for obtaining a fiancée visa so that a bride can obtain permanent residence in Canada when her visa is issued.

15. We recommend that federal immigration law provide that a man may not sponsor more than one spouse in his lifetime, unless humanitarian reasons justify an exception in the case of divorce or the death of his wife, following an investigation into the first marital relationship.

16. We recommend that federal immigration law be amended to allow a bride to remain in Canada during proceedings for breach of promise of marriage against a consumer-husband who refused to marry her before the expiry of the 90-day time limit after her entry into Canada.

17. We recommend that provincial legislatures reinstate, if necessary, the former cause of action for breach of promise of marriage specifically for mail-order brides.

18. We recommend the creation of a federal-provincial legal aid fund for immigrants, which mail-order brides could use to institute an action for breach of promise of marriage.

19. We recommend that federal and provincial law be amended so that a mail-order bride will not lose her permanent resident status and the benefit of a sponsorship undertaking if her marriage to the consumer-husband is annulled.

20. We recommend that the federal and provincial governments inform mail-order brides of their rights with respect to marriage and marriage breakdown.

21. We recommend that federal and provincial immigration authorities investigate each consumer-husband prior to the approval of a sponsorship undertaking and the granting of a fiancée or spousal visa to the bride, in order to identify consumer-husbands likely to engage in criminal activities.

22. We recommend that a federal-provincial legal aid fund be created for immigrants, which mail-order brides could use to provide for their basic needs for the duration of any criminal proceedings.

23. We recommend that federal immigration law be amended so that a bride who has been the victim of a criminal act committed by her consumer-husband will be granted permanent resident status while her abuser is being prosecuted.

24. We recommend that the federal government take the necessary measures to meet its international commitments regarding prostitution.

25. We recommend that the Canadian provinces take the initiative in specifically regulating mail-order bride agencies operating in Canada in order to limit the abuses in this business and to identify agencies engaged in criminal activity.

CONCLUSION TO CHAPTER II

The mail-order bride phenomenon enables a consumer-husband to meet a spouse from the Third World. It results in the immigration of the bride to Canada. In the last decade, this phenomenon has grown to reach the ranks of the most flourishing industries. However, the sexual, generational, economic, ethnic and educational inequalities characteristic of the relationships created by the mail-order bride phenomenon often lead to abuse and even spousal violence by the consumer-husband. In Canada, it is therefore important to adopt measures to provide protection and legal recourse for the bride, in order to reduce her state of dependence on her consumer-husband. However, since many MOB agencies do not have a place of business in Canada, it is difficult to actually regulate the mail-order bride trade. It should not be a matter of infringing on the fundamental rights of Canadian citizens in search of spouses from abroad. On the other hand, newly arrived brides too often find themselves in unacceptable situations of subordination and abuse.

From a legal standpoint, many areas of law apply to the various operations involved in the mail-order bride trade. Indeed, these practices raise issues of contract law, immigration law, the law of marriage and marriage breakdown, as well as private international law and criminal law. The result is a tangle of public and private law, provincial and federal law, necessitating a concerted effort on the part of the different levels of government in Canada to implement effective and realistic reforms for the protection of brides.

Within the context of Canadian law, we believe that contract law offers no real remedy for a bride. In immigration law, we recommend the elimination of the condition of marriage for obtaining a fiancée visa, the prohibition of serial sponsorship and raising of the minimum age for a spousal visa, with the aim of reducing the bride's dependence in her relationship with the consumer-husband. As for the law of marriage, we have emphasized the importance of the validity of the marriage, whether it takes place in Canada or abroad, because it is a condition of the bride's permanent resident status. We have also suggested the reinstatement of the action for breach of promise of marriage in order to compensate the aggrieved fiancée, if the recommendation to eliminate the fiancée visa is not adopted. Moreover, termination of the matrimonial relationship does not jeopardize the bride's security, since her status remains intact and the consumer-husband's sponsorship undertaking guaranteeing her financial stability survives the break-up of the marriage.

Finally, we propose the adoption of measures to encourage brides to take legal action against their abusive consumer-husbands. For example, we suggest that the bride be granted permanent residence and that a legal aid fund be established, two measures that would enable the bride to institute civil and criminal proceedings.

In the final analysis, the solutions to the various aspects of the MOB trade must be many and varied. Indeed, they must aim at legal reform, diplomatic reform and improved dissemination of information. And they must take place at all levels, i.e., provincial, national and international.

GENERAL CONCLUSION

Within the context of the research project of Status of Women Canada on the theme of trafficking in women in Canada, we have analysed the legal framework for two forms of trafficking in women, namely, the hiring of immigrant live-in caregivers and the mail-order bride business. For the purposes of our study, we defined trafficking in women as the exploitation of a woman, in particular for her labour or services, with or without pay, and with or without her consent, by a person or group of persons with whom she is in an unequal power relationship. Trafficking in women, which takes the form of abduction, the use of force, fraud, deception or violence, results in cross-border movements of people between countries differentiated by economic inequality. The effects of this trafficking include the legal or illegal immigration of women to Canada, and the violation of their fundamental rights.

Despite the apparent neutrality of the law governing these situations, we have chosen a feminist theoretical framework, since the focus of our research is the fate of the women being trafficked. In addition, we have adopted an intersectional approach, which takes into account the interrelationship among the ethnic, religious and cultural identities of the women subjected to these forms of exploitation.

In the first chapter, we analysed the phenomenon of hiring immigrant live-in caregivers. The legal framework for this phenomenon raises issues in immigration law, labour law and social legislation, human rights, as well as contract law.

These workers enter Canada under the Live-in Caregiver Program. The unequal relationship between an immigrant live-in caregiver and her employers, the obligation to live in their home for a period of two years, and the precarious status of the worker during this period, among other factors, lead to situations of abuse. Hence we propose that this program be abolished because it permits the exploitation of immigrant workers and violates their fundamental rights. However, to enable these workers to immigrate to Canada and make up for the scarcity of live-in caregivers in this country, we suggest that the immigration criteria for the independent immigrant class be amended. We propose that the *Immigration Act* include "live-in caregiver" among those occupations in demand in Canada, and give greater consideration to the experience of these workers.

Alternatively, for strategic reasons, in the event that the program is not abolished, we recommend that it be improved by granting these women permanent residence upon their arrival in Canada, reducing the work period to 12 months, and removing the obligation to live in the home of their employers. We also recommend that agencies recruiting live-in caregivers be regulated. Finally, we suggest providing more generous and stable funding for organizations assisting these women, more complete information to be distributed to the women themselves, financial assistance to parents, and a national childcare program.

In the area of labour law, we believe the exclusion of live-in caregivers from certain provisions in labour and social protection legislation to be unjustified. Accordingly, we

propose that these workers have access to the same benefits and protections as all other Canadian workers.

Finally, we are of the opinion that the contracts required by the various levels of government serve no purpose because enforcing the obligations of the employers is unrealistic given the unequal and precarious position of immigrant live-in caregivers, and the fact that they live in the home of their employers and do not know their rights. Thus, we recommend the increased dissemination of information to these workers about their rights, and the implementation of a registry of employers.

The second chapter deals with practices in the mail-order bride (MOB) trade. Through mail-order bride agencies, operating primarily on the Internet, consumer-husbands meet women who will become their fiancées and eventually their wives. These meetings result in marital relationships often characterized by subordination and dependence, which keep the brides under the yoke of their consumer-husbands and sometimes lead to spousal violence. Moreover, the multiple forms of inequality interact to place the brides in an inferior position within the economic, sexual, ethnic and cultural hierarchical dichotomies. Finally, the very great age difference that typically exists between brides and their consumer-husbands only serves to increase the control the consumer-husbands exercise over them.

From a legal standpoint, no legislation deals specifically with the mail-order bride industry. Consequently, we analysed those areas of law that could govern the various transactions involved in the mail-order bride trade: contract law, immigration law, the law of marriage and marriage breakdown, private international law, and criminal law.

We concluded from that analysis that contractual remedies are of little benefit to a mail-order bride. However, immigration law offers a married bride certain legal protections worth exploring. A bride who enters Canada on a spousal visa has permanent resident status and the financial security provided by the sponsorship undertaking of the consumer-husband. On the other hand, a bride-fiancée remains subject to conditions that make her vulnerable to an abusive consumer-husband and to pimps. Consequently, we propose removing the condition of marriage for obtaining a fiancée visa. We also recommend prohibiting serial sponsorship as well as raising the minimum age of a spouse admitted to Canada.

The existence of a valid marriage, whether it takes place in the bride's country or in Canada, is a necessary condition with regard to the criteria for admission as an immigrant to Canada. Thus, we have analysed the technical aspects of the validity of such marriages. In addition, we propose the reinstatement of the former cause of action for breach of promise of marriage. Last, marriage breakdown does not affect the bride's permanent resident status or the sponsorship undertaking of the consumer-husband, who remains financially responsible for his former wife.

We have also underlined the links between the mail-order bride phenomenon and certain criminal activities, such as spousal violence and procuring for the purposes of prostitution.

Finally, we recommend that MOB agencies be regulated. We also suggest various measures, such as granting abused fiancées permanent resident status and establishing a legal aid fund to encourage brides to take legal action against consumer-husbands who are irresponsible or engage in criminal activities. These measures would also enable brides to find a way to legalize their immigration status in Canada.

Many differences exist between the two phenomena involving trafficking in women which are the subject of this report. From a legal standpoint, immigrant live-in caregivers are governed by a special immigration program. In contrast, because there is no specific legislation dealing with the mail-order bride trade, the various transactions involved are regulated by an assortment of laws.

Despite the differences, these two forms of trafficking in women are related in several ways. They share common elements, such as (1) the reasons prompting women to leave their countries of origin, (2) the structures of interrelated inequalities characteristic of both, and (3) the manner in which Canadian law treats the legal operations involved.

First, both phenomena promote the migration of women from the Third World to countries in the First World. On the one hand, in the Third World women are the first to suffer the consequences of economic crises. Moreover, Third World countries can easily do without these workers, who make up a majority of the unskilled labour force because they do not have the same access to education and property as their male fellow citizens. Thus, the rampant poverty in those countries affects women in particular, and leads them to find solutions to supporting their families by going abroad. Some become immigrant live-in caregivers, while others choose marriage to a consumer-husband in the First World.

On the other hand, citizens of the destination countries refuse these jobs and reject some men, who look for more submissive women. If consumer-husbands renounce their feminist and more demanding female compatriots, the odds are that a large segment of Canadian women feel the same way about those particular men. Also, despite the decades-long shortage of live-in caregivers and high unemployment rates in Canada, Canadian citizens avoid this type of work. Finally, unlike most inhabitants of the Third World, some citizens of First World countries have the financial resources to purchase the services of live-in caregivers and wives.

In short, in both forms of trafficking in women examined here, the economic disparity between the countries of the Third World and those of the First World encourages the migration of female workers and spouses. While Third World countries can do without them, some First World citizens can afford to purchase the services of these foreign nationals, while others refuse the work of live-in caregivers as well as the roles taken by the brides.

Second, the inequalities characteristic of the relationship between employers and live-in caregivers and between consumer-husbands and brides also have several common traits. In fact, in both these phenomena, labour relations and marital relations are marked to varying degrees by economic, sexual, ethnic, educational and cultural inequalities. These relationships place the women in a subordinate position within the multiple hierarchical dichotomies. Consequently, in both cases, women live in power relationships likely to engender abuse and exploitation.

Third, parallels between the hiring of immigrant live-in caregivers and the mail-order bride trade are evident in the legal context. Each of these phenomena raises interrelated issues of private law and public law. While the hiring of immigrant live-in caregivers involves labour relations in the domestic sphere, contractual relations and social protection, the MOB trade raises issues in contract law as well as the law of marriage and marriage breakdown. However, the uniqueness of these two phenomena resides in the fact that these legal issues have close and complex connections with immigration law, and sometimes even with criminal law, both of which are in the realm of public law. Finally, each phenomenon raises legal issues that fall within the legislative competence of both levels of government. Thus, we conclude that a reform of these two phenomena will have to be effected through a combined effort on the part of the various Canadian governments.

The measures taken by Canadian governments will prove futile, however, without concerted efforts at the international level. The hiring of immigrant live-in caregivers and the mail-order bride trade are forms of trafficking in women — by definition, forms of international trade. To regulate these phenomena, international co-operation is obviously necessary for several reasons. The primary cause of their proliferation resides in the increasing economic disparity between the countries of the Third and First Worlds. The community of nations, including Canada, will have to collaborate to achieve a more equitable redistribution of the world's wealth. The goal of such international co-operation would be to ensure better living conditions for people everywhere. Development programs must aim to combat sexism and provide girls and women with access to education and ownership of property in order to guarantee them better prospects for work and survival. Canada must continue to participate in international development. However, it must also provide better living conditions and protective measures for female foreign nationals who choose to immigrate to Canada and continue their lives here. We have proposed such measures in our report.

In our opinion, Canada occupies a key place on the international scene and enjoys great respect, particularly because of its commitment to multiculturalism. Canada is thus in a good position to regulate trafficking in women. Consequently, we hope that Canada will continue to play a leading role in ensuring co-operation between Third and First World countries in order to find ways of controlling the various forms of trafficking in women.

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CHAPTER I: IMMIGRANT LIVE-IN CAREGIVERS

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